

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 TYLER DIVISION

4 SMARTFLASH LLC, ET AL. ) (

5 ) ( CIVIL DOCKET NO.

6 ) ( 6:13-CV-447-JRG

7 VS. ) ( MARSHALL, TEXAS

8 ) (

9 APPLE, INC., ET AL. ) ( AUGUST 13, 2015

10 ) ( 9:15 A.M.

11 MOTION HEARING

12 BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

13 UNITED STATES DISTRICT JUDGE

14  
15 APPEARANCES:

16 FOR THE PLAINTIFFS: (See sign-in sheets docketed in  
17 minutes of this hearing.)

18 FOR THE DEFENDANTS: (See sign-in sheets docketed in  
19 minutes of this hearing.)

20 COURT REPORTER: Shelly Holmes, CSR-TCRR  
21 Official Reporter  
22 United States District Court  
23 Eastern District of Texas  
24 Marshall Division  
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25 (Proceedings recorded by mechanical stenography, transcript  
produced on a CAT system.)

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I N D E X

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 This is the time set for a hearing before the Court in  
4 the Smartflash, et al., versus Apple Inc. case. This is Civil  
5 Action 6:13-CV-447.

6 This is the time scheduled by the Court for hearing on  
7 the Plaintiffs' motion to reconsider, also on a general status  
8 conference as set by the Court.

9 Let me call for announcements on the record. What  
10 says the Plaintiff?

11 MR. CALDWELL: Good morning, Your Honor. Brad  
12 Caldwell on behalf of Smartflash. And with me today,  
13 Mr. Austin Curry, who may present, depending on the issue,  
14 Mr. John Summers, Mr. Johnny Ward, and Mr. Daniel Pearson. The  
15 Plaintiff is ready, Your Honor.

16 THE COURT: All right. What says the Defendant?

17 MS. SMITH: Good morning, Your Honor. Melissa Smith  
18 on behalf of Apple. I'm joined today by Mr. Mark Perry,  
19 Mr. Mark Lyon, Mr. Kevin Post, Mr. Brett Rosenthal,  
20 Ms. Jennifer Rho. And, Your Honor, Mr. Perry and Mr. Lyon hope  
21 to present to you today. And we're ready to proceed.

22 THE COURT: All right. Thank you.

23 Well, the Court originally scheduled this as a status  
24 conference, and then in light of the motion to reconsider,  
25 determined that it would be more efficient if that was folded

1 into the hearing regarding the status of the case, as well.

2 And so both are set. I think both are complementary.

3           Probably what I will do this morning is I'll take up  
4 first arguments on the motion to reconsider, and I may have  
5 questions during that argument that go to a broader status and  
6 scheduling-type inquiry. Then once there's been completed  
7 argument on the motion to reconsider, if there are other  
8 status/scheduling-related issues that we haven't touched on  
9 through the argument on the motion itself, then the Court will  
10 take those up following the argument.

11           So with that, I'll hear argument from the movant  
12 Plaintiff on their motion to reconsider the Court's previous  
13 ruling of July the 7th, ordering a new trial on damages in this  
14 case.

15           I'll hear from the Plaintiff first.

16           MR. CALDWELL: Thank you, Your Honor. May it please  
17 the Court.

18           Your Honor, on behalf of Smartflash, we respect the  
19 Court's time, and we're grateful for being heard on this issue  
20 today. We come to you in large part because Your Honor said on  
21 a few occasions related to this issue that Your Honor is trying  
22 to get it right, despite which way the parties have -- have  
23 pointed and semantic confusion in the past and the way things  
24 stand right now is not right.

25           Although it seems like there's some time that passed

1 and just as a reminder, the Court's order that granted the new  
2 trial was on July 7th. On July 9th -- well, actually the next  
3 day I flew to D.C., and on July 9th, Mr. Perry and I argued the  
4 appeal at the Federal Circuit, and then the case was  
5 immediately stayed temporarily the next day.

6 So they -- we tried to get this on file with you as  
7 soon as we could once the stay was lifted, which was entered  
8 right after the new trial orders. So I didn't want Your Honor  
9 thinking that we didn't react quickly to that -- to that issue.

10 THE COURT: And what was the time period, counsel,  
11 between my order for the new trial and the Circuit's ultimate  
12 decision not to stay the further progression of this case?  
13 Wasn't it something like 19, 20 days? Do you know that number?

14 MR. CALDWELL: I don't know the number off the top of  
15 my head.

16 THE COURT: All right.

17 MR. CALDWELL: And I want to say that it ended up  
18 being -- well, I don't know. I don't want to guess and be  
19 incorrect. I think it was the -- the last Thursday in August,  
20 meaning that it had been a couple of weeks, about 20 days,  
21 something like that.

22 THE COURT: Well, part of why -- obviously, part of  
23 why we're here is because whatever that ultimate period of time  
24 was, that wasn't factored into the Court's setting the new  
25 trial on damages on September the 14th, and that time has

1 obviously been lost to both parties. And consequently, one of  
2 the things I want to hear about today, either as part of the  
3 argument in this motion or as a part of the status conference  
4 is where both parties are with regard to being ready to proceed  
5 on the new damages trial.

6           However, I really -- I think I need to precede that,  
7 especially in regard to your position, in light of the briefing  
8 that you filed.

9           Let me -- let me just ask you this. My reading of  
10 your briefing leads me to at least suspicion that your takeaway  
11 position on all of this is that your damages evidence was  
12 proper in the original trial, it's proper now, and even though  
13 I've ordered a new damages trial, I at least suspicion, based  
14 on your briefing, that what you're going to tell the Court is  
15 you plan to offer the same evidence from the same witnesses if  
16 we try this again.

17           If that's the case, I need to know that. If -- if  
18 that's not the case and you intend to develop a substantially  
19 different damages model, supported by substantially different  
20 evidence, then I need to know that, as well.

21           So what is the Plaintiffs' ultimate position, because  
22 I certainly don't have time to waste on a damages trial if it's  
23 going to be the same witnesses saying the same thing. But if  
24 it's not, then that obviously is different. So tell me, where  
25 are you?

1 MR. CALDWELL: I feel -- I feel a little bit by the  
2 question I'm put in the position of saying I can -- and we  
3 won't have the other trial and maybe something goes on appeal  
4 if I just say we'll repeat ourselves. But with all due respect  
5 to the Court's honor -- the Court's order --

6 THE COURT: I'm trying to pin you down.

7 MR. CALDWELL: No, I understand you are.

8 THE COURT: I need a straight answer --

9 MR. CALDWELL: I --

10 THE COURT: -- to this question.

11 MR. CALDWELL: I -- I absolutely understand you are.  
12 And what I'm -- what I'm -- what I'm getting at is with all due  
13 respect to the order that Your Honor put out, it said, I expect  
14 you to come back with something different. And so we've worked  
15 on that, and if we are bound by the existing new trial order  
16 and if Your Honor's not persuaded by the arguments I'd like to  
17 present today on the reconsideration, we've been acting, based  
18 on the express text of Your Honor's order that says, I expect  
19 you to come back with a different model.

20 And so what we've been working on is putting out a  
21 model that doesn't use new evidence that wasn't in the record  
22 and wasn't known but is a substantially different model. So,  
23 in other words, in order to minimize the need to reinvent the  
24 wheel on discovery or anything like that, it's all based on  
25 evidence that the parties took discovery on long, long ago, but

1 it's just a fundamentally different model, not based on  
2 surveys, for example.

3 THE COURT: Can you be any more precise than that?

4 MR. CALDWELL: I can, and I think if -- if we go into  
5 too much detail, that maybe Mr. Curry will take over.

6 But fundamentally, the model would look at per device  
7 licensing rates that the predecessor Smartflash companies had  
8 considered and content rates that they had considered, as well,  
9 and then applying those to Apple but making some adjustments  
10 that the economists feel are appropriate based on Apple's  
11 profit margins, for example.

12 THE COURT: Let me ask you this. Is -- from a high  
13 level -- I'm not trying to get specifics. I'm not trying to  
14 make you tip your hand in advance of the trial.

15 But to get an understanding of what -- what the Court  
16 may be looking at, is it correct for me to assume that you'll  
17 be using already developed evidence, but you'll be using it to  
18 support this theory that you've set forth in your briefing  
19 which essentially seeks to identify a sub-portion of the  
20 overall market and then apply the Entire Market Value Rule to  
21 that identified or carved out subset or sub-portion of the  
22 entire market? Is that -- is that where we're going, or is  
23 it -- is that a placeholder, and I'm going to see something  
24 different at the -- at the damages trial?

25 MR. CALDWELL: I may have -- I may have misunderstood



1 Your Honor's question, and I apologize.

2 But if what -- if I understood it, we would be doing  
3 a -- an entirely different model that doesn't have anything to  
4 do with the total revenue of any full population or subset of  
5 population of products applied against the rate.

6 So it isn't akin to the old model. It'd be more of a  
7 per device price-type model, if that makes sense, something, I  
8 think, very different.

9 THE COURT: All right. Let me see if I can ask a --  
10 another question in this regard.

11 In your reply that was just filed yesterday --

12 MR. CALDWELL: Yes, Your Honor.

13 THE COURT: -- you talk about a sub-population of  
14 products for which the Entire Market Value Rule's requirements  
15 would be met and that you properly invoked this sub-population  
16 application of the Entire Market Value Rule at the prior trial.  
17 So -- and that's -- you know, I'm not going to comment on  
18 that -- that assertion.

19 What I'm trying to decide, is that the thrust of your  
20 new damages model and evidence, or is it not? I mean, is  
21 that -- is that the hook you've -- you're hanging your hat on  
22 going forward, and you're going to use evidence previously  
23 developed through existing discovery, but that is the target  
24 that you're trying to hit and the -- the endpoint you're trying  
25 to reach, as you've set forth in your briefing, or is that not

1 where -- is that not where the damages evidence is going to go  
2 in a new damages trial? I hope that's a clear question.

3 MR. CALDWELL: It is. It is. I understand your  
4 question.

5 It is not where we believe the evidence would go with  
6 the new model in the new trial, but that's because we have been  
7 acting upon Your Honor's new trial order that is telling us I  
8 expect to see something substantially different.

9 So the answer to your question is, no, that's not  
10 where it would go. I just don't want to be suggesting to Your  
11 Honor that we're disavowing the proprietary of the old model  
12 certainly.

13 THE COURT: So in other words, what you're saying in  
14 your motion to reconsider is you don't think we need a new  
15 trial on damages, you think I should enter judgment based on  
16 this theory and the evidence that was present -- produced and  
17 presented at the earlier trial, but as an alternative to that,  
18 if the Court doesn't accept that and adopt that, then you're  
19 prepared to go forward at a new damages trial with a new  
20 presentation using evidence that may have been previously  
21 produced but not previously presented at the earlier trial; is  
22 that accurate, counsel?

23 MR. CALDWELL: I think that it's slightly more than  
24 that.

25 THE COURT: Okay.

1 MR. CALDWELL: The evidence that we would use has  
2 also, I believe, been presented at the old trial. It just  
3 wasn't packaged by the economist as the -- as the model.

4 So I think actually it's almost exclusively -- it --  
5 it probably is exclusively admitted evidence from the old  
6 trial. It just came in, and it wasn't maybe applied in the way  
7 that it would be applied in a -- in a new model.

8 And I'm -- and I'm not talking about even the surveys.  
9 I just mean, for example, we were already talking about things  
10 like Apple's profit margin. We talked about old licensing  
11 policies from the predecessor company and things like that.  
12 These were admitted evidence in the record.

13 THE COURT: Well, since I -- since I granted the new  
14 trial on damages, there's been a lot of discussion in the  
15 public domain about the instruction to the jury, but the  
16 portion of my order that indicated the Court had material  
17 concerns about the damages theory and model presented seems to  
18 have been missed by most of the journalists out there. I want  
19 to make sure it's not missed by the counsel of the case.

20 And had I been convinced that your damages evidence  
21 was adequate to support the verdict, I wouldn't have granted  
22 the new trial. But I had some -- I had material and -- and  
23 serious concerns that it was not adequate. So that's why I  
24 really need to know, am I going to see the same thing and hear  
25 the same arguments supporting the same theory, or am I not?

1 Because if it's -- if it's the same thing all over again, we  
2 don't have time to do that.

3 MR. CALDWELL: Understood. Understood. And -- and  
4 we're not wanting to waste your time or a jury's time. And,  
5 no, it's not to be the same theory all over again, not at all.

6 THE COURT: Let me ask you this then. Given that  
7 discussion, again, without revealing specifics, where are you  
8 as far as being ready to go forward at a new damages trial?  
9 How much more time do you think you need, and when do you think  
10 it would be appropriate for the Court, in light of the delays  
11 created by the Circuit's stay that make the current date fairly  
12 untenable, and I think I signaled that in my order setting this  
13 hearing? When do you think on the calendar a tenable target  
14 date for such a trial might be?

15 MR. CALDWELL: I think it's -- I think it's very soon,  
16 and I would say, you know, even as a practical matter, early in  
17 October would be fine. And here's why. I think that it all  
18 comes down to evidence that there's already been full discovery  
19 on.

20 Now, that leads to a broader issue that we probably  
21 need to talk about today. And if we want to transition to that  
22 issue, by all means, I'll -- I'll probably yield the microphone  
23 to Mr. Curry. But just a --

24 THE COURT: As I clearly made it -- I mean, I made it  
25 clear, or I tried to when I came out here, I'm pretty much

1 melding your motion and the status conference together.

2 MR. CALDWELL: I understand.

3 THE COURT: So as long as we cover the entire  
4 waterfront, I'm not particularly concerned in -- about the  
5 order in which we do it.

6 MR. CALDWELL: Yes, Your Honor. I just wanted to  
7 flag for the --

8 THE COURT: So if you need to bring co-counsel to the  
9 podium, you can feel free to do so.

10 MR. CALDWELL: Thank you, Your Honor. I appreciate  
11 that.

12 The -- the thing I wanted to raise is, for example,  
13 something that wouldn't probably be known to you because the  
14 way the discovery happens. Apple has recently just sent us  
15 supplemental interrogatory answers saying I know we didn't have  
16 non-infringing alternatives for the first couple years of this  
17 case, but now we them, and there's a bunch of them.

18 Well, we went through the whole fact discovery period,  
19 took all the 30(b)(1) depositions, took all the 30(b)(6) depositions, did  
20 all the technical analysis, the -- the presentation, and ended  
21 up with a stipulation that they had no non-infringing  
22 alternatives, and now they want to change that.

23 Plus, you've heard counsel for Apple say they want a  
24 do-over on infringement because of the intertwinement, which  
25 we've not been able to make a lot of sense out of. But, I

1 mean, just to put it succinctly, it seems like Apple wants to  
2 basically treat the February trial like an ex -- a mock trial  
3 where they tested some theories. And they just want to come  
4 back and retry any issue that didn't work out in their favor.

5 And I raise that because I think that we're dealing  
6 with evidence that is -- has been discovered and the parties  
7 have been aware of for a long time. I think we wanted to see  
8 if there's any guidance that came out of today's hearing, but  
9 we can promptly put out the expert report after whatever we  
10 learn from today's hearing, I think, probably within a day or  
11 two.

12 And I think Apple can respond to it in short order. I  
13 mean, even when there were Daubert issues that came up during  
14 the trial, we had to redo our whole damages in two weeks, and  
15 they had to respond to it in two weeks. There's -- there's no  
16 reason something similar can't apply now, and I think we can be  
17 ready for trial by the beginning of October.

18 If what Smartflash perceives as a fundamental  
19 injustice that says, hey, look, we're going to just sort of  
20 nullify that whole jury and start from scratch on a lot of  
21 different issues, or we're going to just re-open fact discovery  
22 on things, in theory, we could have told you a long time ago.  
23 If that's the world in which we live, I suspect Apple -- and I  
24 suspect Apple will say it is -- they're going to want to push  
25 this back a lot longer and essentially re-open fact discovery,

1 which I can't see any reason in which that makes sense.

2 I mean, the -- the parties spent tons of money working  
3 on -- on the case, tons of time working on the case, and the  
4 liability side, even if we assume we're in the world where we  
5 have to retry damages, the liability side and all of those  
6 30(b)(1) depositions and document reviews and interrogatory  
7 answers are water under the bridge.

8 There's no reason I can see that Apple should be able  
9 to say, well, we didn't like how the choices we made before  
10 panned out. We want a do-over. And that's why I think it --  
11 it affects the -- the ultimate schedule a little bit.

12 Your Honor, may I walk over and grab my water?

13 THE COURT: You may.

14 MR. CALDWELL: Thank you.

15 THE COURT: All right. Well, having -- having heard  
16 that, let me ask one more question, then I want to get back to  
17 the substance of your motion to reconsider.

18 Whenever a new damages trial takes place, what do you  
19 believe the necessary amount of trial time would be to try the  
20 damages issue from jury selection to verdict?

21 MR. CALDWELL: We're thinking approximately three  
22 days. It may be done in less than that.

23 THE COURT: Three days for both sides, not just for  
24 your side?

25 MR. CALDWELL: I think so. I think so.

1 THE COURT: Okay.

2 MR. CALDWELL: I mean, assuming it's a pick-and-go  
3 sort of jury selection, and -- and none of us are wasting time  
4 and whatnot, I don't see that there'd be any -- any real  
5 problem getting that done.

6 THE COURT: All right. Well, let's step back now and  
7 let me hear from you on your remainder of your argument on your  
8 motion to reconsider.

9 MR. CALDWELL: Thank you.

10 Mr. Summers, will you put up Slide No. 2?

11 I think the new trial order suggests that the Court is  
12 well aware of this, but the new trial order was based on  
13 grounds that Apple neither pre -- preserved nor asked for, and,  
14 in fact, if there were any error, which we don't believe there  
15 were -- there was, it was error that was invited by Apple, and,  
16 therefore, the order came under 59(d).

17 The Court found that Smartflash did not attempt to  
18 apply the substantive legal rule known as the Entire Market  
19 Value Rule, and the Court agreed with Apple's argument that a  
20 new trial on damages was necessary in light of the instruction.  
21 However --

22 Could we go to Slide 3?

23 -- there's really two issues, both of which -- it's  
24 Smartflash's position both of these points -- or either of them  
25 is really a better way to say it -- either of these points,



1 these questions, when answered, necessitates reversal of the  
2 Court's new trial order.

3 The first issue, is a royalty calculated on total  
4 revenue of a sub-population of accused products an application  
5 of the Entire Market Value Rule? We submit that the answer is  
6 yes. But even if the Court says, no, the second point, can a  
7 legally correct but at worst inapplicable jury instruction on  
8 the Entire Market Value Rule warrant the new trial? And the  
9 answer to that question is, no.

10 And we think there's a lot of confusion introduced on  
11 that point at the last hearing which I'd like to address today.

12 But turning to the first issue. The law is clear that  
13 a patent owner can construct a royalty base of the revenue for  
14 a sub-population of accused products if the products in that  
15 sub-population satisfy the EMVR.

16 THE COURT: What's your authority for that?

17 MR. CALDWELL: Well, the authority for that is a  
18 couple of different things. It's both the Garretson case and  
19 LaserDynamics, and I'll move through both of those if -- if --  
20 and I can go directly to them if you want, but I -- I wanted to  
21 show how we got there.

22 THE COURT: All right.

23 MR. CALDWELL: Okay. And actually up until recently,  
24 up until it was favorable for Apple to do so, Apple didn't  
25 disagree.

1 I think one thing that you -- you saw in Apple's  
2 response motion -- or response brief that they filed regarding  
3 our request for reconsideration is Apple is almost mockingly  
4 dismissing the -- the way in which Smartflash tried to bring  
5 clarity to the point that there is certainly the total revenue  
6 aspect of the EMVR, but there is also an aspect when you look  
7 at a sub-population, but what you do is you take the entire  
8 revenue of that sub-population.

9 Can I have Slide 4, please?

10 If we look back at where Apple was in attempting to  
11 win the first Daubert, although Apple says we're making up  
12 these terms, we got the term really for -- the phraseology from  
13 Apple itself. They referred to our model being a  
14 sub-population of accused product sales that was, by  
15 definition, an application of the Entire Market Value Rule.

16 And -- and just so that -- hoping to avoid a  
17 he said/she said between them, that's actually why we referred  
18 to this as the sub-population application. That's Apple's own  
19 words in their original -- their original motion to  
20 strike/Daubert, which led to Smartflash having to redo its  
21 survey.

22 But confusingly, that same notion, when you are  
23 looking at a base that is based upon some sales but not all  
24 sales, that can also properly be characterized as apportionment  
25 of the base. And, again, Apple has referred to it by that

1 name. In other briefing, Apple said for Mr. Mills'  
2 apportionment of the base to have been proper, the relied-on  
3 survey question would have needed to ask whether the patented  
4 feature alone motivated the purchase. And this was in a  
5 paragraph just riddled with citations to LaserDynamics, which  
6 everybody looked at as being an Entire Market Value Rule case.

7 In reaction to that argument, the Court was persuaded  
8 that the surveys asking were you motivated, as opposed to were  
9 you alone motivated, had to be redone. And they were redone  
10 with the very word Apple characterized as both appropriate for  
11 the sub-population application and how you apportion the base.

12 But it's not just a go with us because Apple said this  
13 before, and these are the case I was referring to.

14 If we can have Slide 5 for Garretson.

15 The notion that Smartflash is advancing in this  
16 hearing finds its origin at least in the Garretson case from  
17 the 1800s. Garretson teaches that one way -- well, Garretson  
18 teaches that the demand that the patented feature creates must  
19 always be separated from the unpatented features.

20 And it teaches that one way to do that is by what we  
21 typically think of as apportionment, the presenting evidence  
22 tending to separate the Defendants' profits and the patentees'  
23 damages between the patented feature and unpatented features.  
24 But Garretson also refers to the Entire Market Value Rule.

25 What it doesn't do, it doesn't teach that the EMVR is

1 an alternative to separating the value of the patented features  
2 from the unpatented features. Rather, Garretson is teaching  
3 that damages, in other words, the way of separating value of  
4 patented from unpatented features, it can be calculated on the  
5 entire value of the accused product if there is evidence that  
6 the entire value is properly and legally attributable to the  
7 patent feature, i.e., that the EMVR is the scenario where the  
8 apportioned value of the patented feature is one and the same  
9 as 100 percent of the value of the entire product.

10 But it doesn't just stop with Garretson, because when  
11 we turn to LaserDynamics -- could we have the next slide,  
12 please, here?

13 LaserDynamics tells us when the entire value of an  
14 accused product is properly and legally attributable to the  
15 patented feature -- well, it tells us how we know when it's  
16 properly and -- and legally attributable to the patented  
17 feature, and that's where we get the alone motivate question  
18 that was crucial to Apple's original position before the trial  
19 and crucial to the order striking our first damages report.

20 LaserDynamics tells us that evidence that an accused  
21 feature alone motivates a consumer to purchase the accused  
22 product is evidence that shows the entire computer, in that  
23 case, can be attributed to whatever the patented feature is.  
24 And that's cited on the screen, 694 F.3d 51 at Page 69.

25 THE COURT: Let me ask you this, counsel.

1 MR. CALDWELL: Yes, Your Honor.

2 THE COURT: Of course, we all know that LaserDynamics  
3 came out of this court. I'd been on the bench eight months  
4 when the decision came down, but it obviously was tried by my  
5 predecessor.

6 LaserDynamics is clear that the entire market rule is  
7 an exception -- a narrow exception to the general rule that you  
8 have to apportion and you apply that exception when you can  
9 show that the accused feature alone motivates or drives the  
10 market for the entire product.

11 And I think all of us understand that multi-component  
12 products have features that are alleged to have infringed, but  
13 they also contain almost unavoidably multiple other features  
14 that are not alleged to infringe. And it's not fundamentally  
15 fair to collect damages on the value of non-infringing  
16 features, so you have the apportionment rule.

17 And you have the narrow exception, the EMVR, where you  
18 can show that that allegedly accused feature, that infringing  
19 functionality drives the market for the product.

20 Now, my question is, everything I've read in  
21 LaserDynamics, VirnetX, the recent Ericsson opinion, indicates  
22 that that is a question that's answered by viewing the entire  
23 market as a whole.

24 What I glean from your briefing is that you're taking  
25 a step away from that, and you're arguing that a Plaintiff can

1 identify a sub-portion of the consuming public out there.  
2 Maybe it's 10 percent, and that 10 percent, if you can show  
3 that to them but not the other 90 percent of the public but to  
4 them the accused feature alone drove the market for the  
5 product, then you get to recover damages on a hundred percent  
6 of the value of the product as a whole as to that 10 percent of  
7 the -- of the consuming population.

8           That's what I read your briefing to say. I don't find  
9 that in LaserDynamics. I don't find it in VirnetX. I don't  
10 find it in Ericsson. I -- I find a discussion of the Entire  
11 Market Value Rule being just that, the entire market. Not a --  
12 it's not the submarket value rule. It's the Entire Market  
13 Value Rule.

14           So if there's a basis -- if there's not what Apple  
15 said but what the Federal Circuit or the Supreme Court said  
16 that allows support for that concept, that's what I'd like you  
17 to point out to me.

18           MR. CALDWELL: Yes. Yes, Your Honor.

19           So I think you've correctly stated our position,  
20 because -- because Smartflash does not believe that in order  
21 for your base to involve the entirety of a particular product,  
22 it -- the alone motivation must apply to a hundred percent of  
23 the entire market. You are correct about that.

24           And I -- I'm going to direct you to what I think  
25 LaserDynamics and Ericsson says on that. But conceptually, I

1 think maybe it's helpful to think about it a little bit like  
2 this.

3           For years, there have been lost profits cases, and,  
4 for example, if Apple and Samsung are in a case against each  
5 other where one of them wishes to assert that it is entitled to  
6 lost profits, you still have to do things like what is your  
7 capacity? Are there other people in the market? Would  
8 somebody else have picked up the sales? And it is often if not  
9 usually the case that the party that lost profits can't pick up  
10 its entirety of damages based on lost profits. And then maybe  
11 you say 27 percent of it is in lost profits, but the remaining  
12 73 percent I have to get a reasonable royalty on in order to be  
13 fully compensated. And I think it's an analogous notion to  
14 what's going on here.

15           What -- our position is that we are fairly obtaining  
16 damages for those folks where Apple would have gotten no value  
17 but for the patented features.

18           And with regard to -- to LaserDynamics, I think even  
19 the quote that's on the screen, there's no evidence that this  
20 feature alone motivates customers to purchase a laptop computer  
21 such that the value of the entire computer can be attributed to  
22 the patented dis -- discrimination method.

23           And I think that they're -- what they are noting is  
24 that you are actually able to look at that on a -- essentially  
25 a sale-by-sale basis. I don't -- I don't think that what it's

1 saying is you can't apply this sort of proof to a  
2 sub-population. It's what's the threshold you have to meet  
3 to look at all revenue of a given sale. And I think  
4 that's what -- that's what LaserDynamics is going for with  
5 questions like this.

6 But if I can skip also to Slide 9 from Ericsson.

7 Ericsson is -- is similar. Specifically, where the  
8 entire value of a machine as a marketable article is properly  
9 and legally attributable to the patented feature, the damages  
10 owed to the patentee may be calculated by reference to that  
11 value.

12 Now, I think if -- if what Smartflash had done was  
13 said some people are alone motivated, so, therefore, let's look  
14 at a hundred percent of the revenue of all of the products that  
15 infringe, I think then we would -- we would have a problem.  
16 But what we tried to do was actually track the law that said  
17 for which of these products can we look at, can we make  
18 reference to the entire value of the machine?

19 And I think that's exactly what our model did, and  
20 as -- as I understand it, exactly -- I mean, I understand you  
21 don't want me just to say, Apple said it. I get that. But  
22 it's how Apple went to the Court, and it's how the Court  
23 decided we had to redo our damages.

24 THE COURT: All right. How does this -- how does this  
25 somewhat novel theory of yours, how does it square with the



1 notion that to apply the EMVR, which is clearly an exception to  
2 the rule, how does it square with the notion that to apply the  
3 EMVR, you're showing that the accused feature or functionality  
4 is so important and persuasive that it drives the entire mar --  
5 market for the product? Is it logical then to assume that that  
6 functionality would drive the entire market for a portion of  
7 the consuming public, but it would not drive the entire market  
8 for another portion of the consuming public? Is it not a  
9 threshold case where it either does or it doesn't? And  
10 where -- where is there support for the idea that you can have  
11 it both ways?

12           You can say, this percent of the people that bought  
13 this product were alone motivated by the accused functionality,  
14 therefore, we get to count the value of the entire product,  
15 including the uninfring -- the non-infringing features, but  
16 this remaining portion that together adds up to a hundred  
17 percent of the public was not alone motivated, and so for them,  
18 we have to apportion and limit our recovery to only the value  
19 of the accused functionality as separated from the  
20 non-accuse -- non-infringing functionality?

21           I mean, if it alone drives the market, it alone drives  
22 the market, doesn't it? Or does it make sense to say there's  
23 some of the people out there that are alone motivated by a  
24 function that doesn't also motivate the rest of the people out  
25 there? Is the public such a -- a non-homogenous group that --

1 that some of them will be driven by a feature that will not  
2 drive the rest of them? Is that consistent with the concept of  
3 the EVMR (sic) which talks about driving the market, not a  
4 market, not a subpart of the market, but driving the market?  
5 That's --

6 MR. CALDWELL: I understand --

7 THE COURT: -- that seems somewhat illogical to me.

8 MR. CALDWELL: Okay. Well, I understand the Entire  
9 Market Value Rule to be talking about what -- what drives the  
10 sale of a machine or a product, and --

11 THE COURT: As to the entire market --

12 MR. CALDWELL: And --

13 THE COURT: -- that's the question.

14 MR. CALDWELL: Or --

15 THE COURT: Or is it as to -- is it a  
16 consumer-by-consumer analysis? Are you going to have to  
17 produce a survey for everybody that buys a smartphone?

18 MR. CALDWELL: Well, certainly you don't have to  
19 produce a survey for every single human being, and that's kind  
20 of the -- one of the --

21 THE COURT: While I'm taking the alternative to its  
22 ultimate conclusion.

23 MR. CALDWELL: Right. But a -- but as we discussed at  
24 trial, I think when there was a -- kind of a cross-examination  
25 that implied we didn't survey the entire U.S. population, I

1 mean, it's -- it's basically the statistical purpose of the  
2 survey is to -- to compute the statistics of it.

3 But I think -- I think, yes, we essentially did  
4 produce a survey from which qualified statisticians can do that  
5 analysis, because as I understand it, the EMVR comes down to  
6 what drove the sale. And it doesn't have to be was one thing  
7 the motivator, the sole motivator for every single person that  
8 consumed a device, that that's not -- that's not the standard.  
9 I think it's entirely consistent with the Entire Market Value  
10 Rule.

11 In fact, what I -- what I think Smartflash did is  
12 actually, out of an abundance of caution, was in the Entire  
13 Market Value Rule, the sub-population view that we took, we  
14 weren't getting money on the folks where we couldn't show that  
15 this was the sole motivation. It's actually an abundantly safe  
16 way to do it.

17 I can't remember the context in which this happened,  
18 but I -- I mean, just anecdotally, I remember -- I think it was  
19 an interview that Judge Rader had with a -- with a magazine or  
20 something along those lines, just thinking about this  
21 hypothetical issue of, well, if you go get data and it shows  
22 that maybe 95 percent were motivated, can you look at the  
23 entire 100 percent of the market? What if it's 90? What if  
24 it's 87? And -- and where's that line?

25 What we actually tried to do was do the far safer

1 calculation. Rather than saying, how close can you get to some  
2 arbitrary line and then extend it out to more of the market,  
3 what we said is we won't touch the people beyond the ones we  
4 know where the sale was driven because it's for those people  
5 where the patented feature drove the sale that we meet the  
6 standard that's put forth in Ericsson and in LaserDynamics.  
7 The patented feature led to the sale of the machine. And  
8 that's --

9 THE COURT: Let's talk about Ericsson a minute. Judge  
10 O'Malley wrote that opinion, goes to great lengths to discuss  
11 not only the substantive aspects of the damages but the  
12 evidentiary aspects of the damages. And the Court there talks  
13 about the need for trial courts to make sure that arguments and  
14 evidence is not presented to a jury in the way that would skew  
15 unfairly the jury's ability to apportion the damages and  
16 account for only the value -- value attributable to the  
17 infringing features.

18 So if you have a sub-portion of the consuming  
19 population that you say meets the exception that is the EVMR  
20 (sic) and you have the remainder of the population that doesn't  
21 in which you have to apportion under the general rule, and  
22 they're all in the same case before the same jury, how do you  
23 put on your evidence of EVMR (sic) without skewing the record  
24 for the rest of the damages case where you're apportioning and  
25 not using the Entire Market Value Rule? How do you -- how do

1 you thread the needle between these instructions from the  
2 Federal Circuit about avoiding the kind of evidence that would  
3 skew the jury's ability to fairly apportion and still put on  
4 your entire market value evidence as to what you call the  
5 sub-portion where that applies?

6 MR. CALDWELL: Very fair question as to the  
7 evidentiary aspects of the Entire Market Value Rule.

8 I think the -- the short answer is you do it exactly  
9 like we did in this trial. And what I mean by that was we  
10 never put the 187 billion in front of -- in front of the -- the  
11 jury.

12 Now, from the Plaintiffs' perspective -- I mean, Your  
13 Honor has seen what's happened with damages law over the last  
14 eight or 10 years. From the Plaintiffs' perspective, you --  
15 you get it going and coming. I mean, we -- we -- we know that  
16 at some point, we have to show our work and how the calculation  
17 was done, and the -- the expert has to have presented evidence  
18 that shows exactly how the analysis was performed.

19 And when I came to Your Honor the day of opening and  
20 we were talking about slides, we actually -- Smartflash had a  
21 fear that we actually needed to show how we got to the base  
22 that we used, but Your Honor said we actually -- we couldn't  
23 show the 187 billion, we couldn't show how that was reduced  
24 down. And -- and fine, so those slides are gone.

25 All we did was show the number that we are permitted

1 to show under both the evidentiary and substantive aspects of  
2 the EMVR. We showed just that portion of sales that can be  
3 attributed to the patented feature based on survey evidence  
4 that those folks were alone motivated. I think that alone  
5 satisfies it.

6 And by comparison, if we think back to this -- the  
7 notion of prejudice and skewing the damages and whatnot, I  
8 mean, this is a far cry from something like Uniloc where, for  
9 example, you have a model and the total revenue just really  
10 doesn't have anything to do with it, and -- and then you have  
11 a -- a patent owner saying, hey, by the way, as a sanity check,  
12 look how much money they made overall so what we're asking for  
13 isn't that much.

14 And -- and more recently, Your Honor put out an order  
15 I think maybe last Thursday in the ContentGuard case. And in  
16 the ContentGuard case, I think Your Honor found -- made a lot  
17 of findings that are applicable here as to how many of the  
18 issues go to weight. They don't go to methodology. And I  
19 think that -- that applies to a lot of issues, but not the  
20 specific one I'm talking about right now.

21 Your Honor put out an order on the evidentiary aspects  
22 of the Entire Market Value Rule, as I understood it, where you  
23 were saying, listen, guys, if you think you're going to come in  
24 here and just sort of blurt out the overall revenues, I'm  
25 telling you, you can't do that.

1           And -- and it makes sense because their model was  
2 wildly different. What -- what ContentGuard did as a model is  
3 this sort of willingness to pay. It's -- it's just dollars per  
4 device, and it looked at -- as I understood it, it looked at  
5 some consumer willingness to pay and Apple's willingness to pay  
6 for the feature -- the -- the device manufacturer's willingness  
7 to pay, versus maybe the patentee's willingness to accept, and  
8 then it had some negotiation schema that settles on a number.  
9 But it's like a per device number. You're not actually --  
10 you're taking a per device and multiplying it by number of  
11 devices. It's not a place where a set of the revenue is  
12 multiplied by a percentage.

13           And there it would be utterly gratuitous to blurt out  
14 something about the total revenue. I think perhaps like it  
15 might have been if in this case someone had blurted out, oh, by  
16 the way, what we're asking for isn't much. Did you know they  
17 made 187 billion? We specifically didn't.

18           What we did is show the -- the least amount we needed  
19 to show our calculations that properly applied the Entire  
20 Market Value Rule.

21           THE COURT: All right.

22           MR. CALDWELL: We've -- we've kind of bounced all  
23 over. I don't know if -- if Your Honor wants me to resume on  
24 anything in particular as to --

25           THE COURT: I do want to do one thing, and you

1 triggered my memory when you're -- with this last argument.  
2 I'm going to order both sides to file with the Court under  
3 seal, within 48 hours, the demonstratives that were used before  
4 the jury in the Smartflash trial last March. I want you to  
5 meet and confer if there's any question about what was or  
6 wasn't used, but I want the benefit of reviewing those  
7 demonstratives, as well as the admitted exhibits in the -- in  
8 the record.

9 MR. CALDWELL: Yes, Your Honor, certainly.

10 To the extent my last argument triggered that, what  
11 I -- what I recall being --

12 THE COURT: No, and let me -- let me finish, counsel.  
13 I want those to cover openings, closings, and the direct and  
14 cross of Mills and Wecker. That's -- that's the scope of the  
15 demonstratives I want filed.

16 MR. CALDWELL: Not the stuff on the infringement?

17 THE COURT: Nothing else.

18 MR. CALDWELL: Got you. Yes, Your Honor.

19 THE COURT: Openings, closings, the direct and the  
20 cross on Mills and Wecker, I want to see those demonstratives.

21 MR. CALDWELL: I imagine we can meet and confer with  
22 Mr. Post and probably get that together. You said in the next  
23 couple of business days? Probably Monday?

24 THE COURT: Today is Thursday. File them by noon on  
25 Monday.



1 MR. CALDWELL: Yes, Your Honor.

2 THE COURT: Okay. Go ahead. Just -- you made me  
3 think about that, so I wanted to say it while I had it on my  
4 mind.

5 MR. CALDWELL: Understood.

6 So it is absolutely Smartflash's position that there  
7 is a sub-population application, and I think that, you know,  
8 Apple characterizes Smartflash as having made some big  
9 about-face. And I think -- to be completely candid, I think  
10 some of our briefing is probably inartful on it because there's  
11 confusion over it.

12 Our position was originally, before we even asked the  
13 alone motivate, that we thought that was probably okay under  
14 the controlling law because if we weren't looking at the  
15 entirety of every single sale, we may not be under the  
16 requirement that we ask alone.

17 But we've been absolutely consistent after there  
18 has -- there was the order granting a motion to strike and  
19 telling us to re-run our survey, we've been absolutely  
20 consistent on the substance that having done so, we absolutely  
21 were able to look at the base that included the entirety of  
22 sales of those who indicated through the surveys that they were  
23 alone motivated. And I think anything beyond kind of a  
24 superficial confusion over the semantics shows that we've been  
25 perfectly consistent with that and have really honestly been

1 consistent with everything Apple said up until they decided  
2 that this is kind of an opportunistic route out of the verdict  
3 at this point.

4 We've talked about Garretson. We've talked about  
5 LaserDynamics. And we've talked about the evidentiary  
6 principle of the Entire Market Value Rule.

7 Importantly, I think as to some of the confusion over  
8 the Entire Market Value Rule, for a little bit of context, Your  
9 Honor, back when all the pre-trial hearings were -- were  
10 occurring in -- in Judge Mitchell's courtroom, there was also  
11 an argument that was being raised by the Defendants that you  
12 don't really hear much about now, and that was the Defendants  
13 were taking all of Mr. Mills's calculations and all the various  
14 inputs, and they would put them on a real big slide as this one  
15 big formula that stretched from the left side to the right  
16 side, and then they'd sort of merge the rate calculation and  
17 the base calculation onto one slide and start striking off  
18 inputs here or there to try to reduce it down and say to the  
19 Court, look, really what they're doing is they're getting a  
20 percentage off of total revenue. They -- they kept trying to  
21 actually change the math to say it was a percentage of total  
22 revenue.

23 And consistent with one thing that Your Honor observed  
24 in the ContentGuard order last week, as a practical matter, you  
25 can always say that some number you get is some percentage of

1 the entire revenues. But that's not the way you look at it. I  
2 mean, it's what Your Honor found in that ContentGuard -- that  
3 ContentGuard ruling, and I -- and I completely agree with it,  
4 that's not what you do.

5           So to some extent the reason that there's this  
6 semantic confusion is maybe a little lost with the current  
7 posture of the case, but from the early days, we were also  
8 having to defend against the Defendants making the I think  
9 somewhat red herring argument that everything is a percentage  
10 of total revenue, therefore, we were actually using a total  
11 value model. And we were defending against that a lot of  
12 times, and I think quite candidly, that led to some of the  
13 inartful phraseology.

14           Because we also thought, since we weren't doing a  
15 percentage of the total revenue in that fashion and we had  
16 asked what motivated, we thought we were in an apportionment  
17 world. It's just that once we lost the Daubert, had to redo,  
18 we were in the flavor of the apportionment world where your  
19 evidence on the base is so extreme, you've shown that it's the  
20 sole motivation. And at that point, it uses -- it qualifies  
21 for the entire market value exception. It's the -- as you say,  
22 the exception, the time in which you can tell the jury the  
23 total revenue because we've shown it's sole motivated.

24           THE COURT: Let me ask you this, counsel. Can you  
25 tell me off the top of your head what the effective profit

1 margin that Mr. Mills used in his prior testimony?

2 MR. CALDWELL: For Apple's effective profit margin?

3 I -- I would be completely making it up. I mean, I -- we might  
4 know an approximation.

5 Does Apple mind us saying it in open Court first,  
6 but --

7 MR. LYON: Uh-huh.

8 MR. CALDWELL: Okay. Apple doesn't --

9 THE COURT: Check -- check with your co-counsel before  
10 you leave, and we'll come back to that. If I need to seal the  
11 courtroom to get a response, I'll do that. But I'd like --  
12 that's one of the gaps I have in my materials that I've been  
13 poring through. And while I have the benefit of everybody in  
14 the room, I want to try to clarify that just for my own  
15 thinking.

16 MR. CALDWELL: Yes, Your Honor. And just -- just so  
17 you know in terms of an effective profit margin, I think for  
18 presentation to the jury, certain complexities were -- were  
19 simplified in terms of the math. But as I understand it,  
20 Mr. Mills actually looked at -- because he was looking at, for  
21 example, the iPod Touch and the iPad and the iPhone, and I  
22 think they may have different effective profit margins, so I  
23 don't know if -- the number that we submit to you, do you want  
24 kind of the aggregate that's sort of like the weighted  
25 average --

1           THE COURT: Let's do this. As you're consulting with  
2 opposing counsel about the demonstratives, consult about this,  
3 and separately, but by noon on Monday file a notice with the  
4 Court as to this -- these effective -- this effective profit  
5 margin or these effective profit margins, if you're going to  
6 break them out by device, and file that under seal, as well.

7           MR. CALDWELL: Yes, Your Honor. That -- perfect.  
8 Thank you.

9           Now, I don't want to belabor this point, but Apple has  
10 tried to accuse us of duplicitous behavior, saying that we made  
11 some sort of an about-face.

12           To the extent we have changed a position, it is  
13 actually a change in nomenclature as the issues that  
14 crystallize when we saw what the Court was thinking in 59 -- in  
15 the 59(d), and under -- beginning to understand that the Court  
16 is of the mind -- perhaps inconsistent with the original  
17 Daubert order, the Court is of the mind that maybe the EMVR  
18 wouldn't apply to a sub-population when we were acting  
19 consistent with the -- the motion to -- the ruling on the order  
20 to strike that said we had to meet the EMVR because we were  
21 looking at the entire revenue.

22           So I apologize for any inconsistency in the  
23 terminology, but I think substantively, below the terminology  
24 we've been absolutely consistent that this is a proper way to  
25 compute the base looking at the entire revenue for a

1 sub-population when we showed alone motivation.

2 THE COURT: Well, apologies aren't sought, and they  
3 aren't necessary. And the Court's well aware we don't live in  
4 a static world. In hindsight, it might have been nice if we'd  
5 had the Ericsson decision before the Daubert hearing in this  
6 case, instead of within a week of the Daubert hearing in this  
7 case, but that's the world in which we live. So there aren't  
8 any apologies -- apologies needed from either side in the  
9 Court's view.

10 So to try and bring this argument to a close, counsel.

11 MR. CALDWELL: Yes, Your Honor.

12 THE COURT: What you're asking me to do is accept your  
13 arguments with regard to the damages evidence that was  
14 presented, and you're asking me to enter judgment based on  
15 the amount awarded in the verdict returned by the jury? Or in  
16 the alternative, you want me to sever damages out to be treated  
17 on a bifurcated basis so that the remainder of the case can go  
18 up?

19 MR. CALDWELL: That -- that's correct, Your Honor.  
20 And -- and I think Your Honor really --

21 THE COURT: What's the -- what's the basis for the  
22 latter? I know what the basis of your argument is on the  
23 former.

24 MR. CALDWELL: I think that it would be -- I think it  
25 would be very efficient, quite frankly. It was Judge

1 O'Malley's suggestion at the oral argument that Mr. Perry and I  
2 had in -- in D.C. She proposed it. She proposed it, I think,  
3 in Footnote 2 of the order that affirmed denial of the stay in  
4 the Apple case that said: Under our authority, you can do  
5 that, referring to it as a way that efficiently gets the  
6 liability issues in front of them, including 101.

7 Remember that there is also this parallel world in  
8 which --

9 THE COURT: Well, the Court's -- the Court's well  
10 aware of the parallel world.

11 MR. CALDWELL: Well, the parallel world is costing our  
12 client a lot of money, and, you know, I query whether that's  
13 one of the motives. But it's -- it's an efficient route in  
14 which to -- in which to address that issue.

15 But also I think Your Honor highlighted today one of  
16 the inherent efficiencies of it because Your Honor expressed to  
17 me an understanding of the Entire Market Value Rule as being --  
18 I mean, not -- not to misquote you, but my understanding is  
19 Entire Market Value Rule being an application limited to  
20 basically everybody who buys anything in that -- you know, any  
21 of those products needs to be so motivated.

22 In other words, it has to be sort of a sole -- the  
23 sole driver for all purchases of the accused product, and --  
24 and -- or, I mean -- or close to all. My point being --

25 THE COURT: I did say it is the Entire Market Value

1 Rule.

2 MR. CALDWELL: So as -- as we know, semantics are  
3 sometimes -- sometimes imprecise because I still think it's  
4 the -- we're looking at the entire market value of those given  
5 sales. So I don't think our application is at all inconsistent  
6 even with the name.

7 But the point is -- at least our point in requesting  
8 that relief is that it seems like that there is a discrete  
9 question there that -- on which there is a dispute. It's a  
10 controlling issue of law. And, you know, with Judge O'Malley's  
11 suggestion that maybe an efficient way to handle a lot of  
12 things, including this -- the liability issues and the 101,  
13 which is, again, an issue of law that is ultimately going there  
14 anyway, if we --

15 THE COURT: If the Court were to grant your  
16 alternative request and bifurcate damages, then obviously, the  
17 validity/infringement questions would go up.

18 But this argument about the sub-portion of the  
19 consuming populace in which you say the EVMR (sic) may be  
20 applied, while you apportion to the remainder, that would be  
21 captured within the damages portion of the case and that would  
22 still be awaiting a new trial on damages and having -- having  
23 been bifurcated.

24 MR. CALDWELL: Well, we --

25 THE COURT: So how -- how would you get some guidance



1 on that by me doing what you're asking?

2 MR. CALDWELL: What we asked Your Honor to do was to  
3 certify that for interlocutory appeal, certify that question,  
4 the controlling issue of law question, because that's -- that's  
5 how --

6 THE COURT: Okay. All right.

7 MR. CALDWELL: So the -- the second -- bouncing around  
8 a little bit.

9 The second fundamental issue as -- not on the issue  
10 whether there's this -- the sub-population is appropriate, the  
11 second fundamental issue with regard to why we believe that the  
12 new trial order should be reversed is the jury instruction was  
13 correct. It -- it was not legally flawed.

14 Your Honor recognized this actually in the new trial  
15 order, but if the Court agrees with us on Point 1 that the  
16 sub-population application is a viable application, then we  
17 don't need to get to the second point. But the second point  
18 is, even if the Court still viewed that the Entire Market Value  
19 Rule instruction was inapplicable, the Court committed legal  
20 error in granting a new trial based on giving an instruction  
21 that was legally correct, and at most, inapplicable.

22 Could we see Slide No. 10?

23 I'm confident Your Honor is familiar with this, but  
24 near the end of the new trial order, you acknowledged that the  
25 instruction was not an incorrect statement of law. I -- I

1 don't think Apple has contended it's an incorrect statement of  
2 law. I don't think that Smartflash has contended it's an  
3 incorrect statement of law. And we actually went to the jury  
4 on an Entire Market Value Rule-style instruction with no  
5 objection.

6 And what we know is there's a Second Circuit case  
7 called U.S. v. Bell -- and if I could have Slide 11, please?

8 What we know is that when the Court has given  
9 discretion -- while the Court has given dis -- discretion to  
10 grant a new trial based on jury instruction, the jury  
11 instruction needs to be wrong for that to be the case.

12 In U.S. v. Bell, the Second Circuit found it was an  
13 abuse of discretion to grant a new trial, based on jury  
14 instructions that were legally correct. And that's a quote  
15 here. We hold the district court erred in ordering a new trial  
16 because the district court's jury instructions on intentional  
17 conduct were legally correct and did not constitute error. It  
18 was a plain error standard in that case, much less plain error  
19 warranting a new trial.

20 Here, in this instance, the instructions were legally  
21 correct, and they tracked LaserDynamics.

22 If we could have Slide 12?

23 Not to belabor this point, I -- since nobody's really  
24 disputing the correctness of the instruction, I won't -- I  
25 won't go through. But we were focusing on the part of

1 LaserDynamics, if it can be shown that the patented feature  
2 drives the demand for an entire multi-component product -- and  
3 that -- it doesn't say anything about every single sale of them  
4 or anything of that nature -- then you can look at the entire  
5 revenue of the entire product. And we tracked that in the  
6 instruction.

7           The -- the Court's instruction was telling the jury  
8 precisely what type of evidence is required for the jury to  
9 calculate damages when applying a royalty rate against the  
10 entire value of an accused product. The instruction did not  
11 instruct the jury to calculate damages based on the total  
12 revenue of all accused products, although Apple has, I think,  
13 more recently -- in its last brief, they've argued that now,  
14 well, maybe the jury would have looked at the entirety of the  
15 market, maybe they would have back calculated the market. And  
16 at that point, we're just speculating that the jury didn't  
17 follow the instructions. We're speculating that they did  
18 something based on evidence that wasn't even presented to them  
19 or arguments that weren't even presented to them, but that's  
20 not the way that it works when reviewing a -- a jury  
21 instruction.

22           I mean, there can't be any concern that the jury  
23 misheard the instruction and mistakenly thought the Court was  
24 instructing them to assess damages based on the total revenue  
25 of accused products because that is not at all how the parties

1 joined issue on this during the case.

2 Nobody who was sitting there throughout the case would  
3 have thought we were ever talking about total revenues. It was  
4 quite clear that we were not, and that's why Your Honor didn't  
5 permit the parties to show total revenue.

6 Can I have Slide 13?

7 We know from the Sulzer case, which came out of the  
8 Federal Circuit, that in reviewing the jury instructions, the  
9 full trial record and the jury instructions in their entirety  
10 must be examined because instructions take on meaning from the  
11 context of what happened at trial, including how the parties  
12 tried the case and their arguments to the jury.

13 And in that context, it leaves no room for any concern  
14 that the Court's instruction was ambiguous or that some jurors  
15 might have thought they were allowed to go and try and back  
16 calculate a different base. There was no ambiguity in the  
17 Court's instructions. And even if there had been, when read in  
18 a vacuum outside the context of trial, the context of trial  
19 negates any fear that the jury thought they were instructed in  
20 a different way.

21 Go to Slide 14.

22 Looking at the Court's instructions, the jury was  
23 never given the total revenue. The jury was never given any  
24 way to calculate damages on total revenue.

25 Apple is now claiming otherwise, but they didn't say a

1 word about it until now. Presumably the reason that Apple  
2 never mentioned this fear of some back calculation is the Court  
3 must assume the jury understood the instruction to apply to the  
4 sub-population application.

5 At the time Apple, just like Smartflash and the Court,  
6 were handling the litigation in the context of the trial as  
7 tried, and nobody in that courtroom thought that we had just  
8 secretly not told them total revenue, and they needed to go  
9 compute it to start their damages analysis.

10 Slide 15, please.

11 The law requires the Court to assume that the jury  
12 read and followed the instructions given to them. And this is  
13 in the briefing. I -- I don't want to belabor it, but the  
14 Franklin -- the Francis v. Franklin case is very instructive on  
15 this. It's a Supreme Court case saying absent extraordinary  
16 sit -- situations, you adhere to the crucial assumption that  
17 underlies the constitutional system of trial by jury, that  
18 juries carefully follow instructions. We must assume that for  
19 the most part, they understand and faithfully follow the  
20 instructions.

21 The concept of a fair trial encompasses a decision by  
22 a tribunal that has understood and applied the law to all  
23 material issues in the case.

24 And I know many Judges are very sensitive to ellipses.  
25 I think basically what's removed is they are quoting another

1 Supreme Court Justice in an earlier case, if I remember  
2 correctly.

3           So as a result, even if the Court does not think that  
4 Smartflash met the Entire Market Value Rule or that the -- or  
5 the Court concludes the Entire Market Value Rule was entirely  
6 inapplicable to this case, the law still requires the Court to  
7 presume that the jury followed the apportionment instructions  
8 and evaluated Smartflash's evidence under that construction.

9           So at worst, giving a legally correct instruction on  
10 an issue for which a party offers insufficient proof, if that  
11 were the case, is harmless error. And we start with the  
12 assumption that the verdict is otherwise supported with  
13 substantial evidence.

14           The Court's order granting a new trial does not  
15 address substantial evidence, and -- and I think that that  
16 could be in part due to some confusion from the last hearing.

17           Counsel for Apple, in the -- in the last hearing,  
18 represented that, well, if you have an extraneous instruction,  
19 even if legally correct, you got to grant a new trial. And  
20 respectfully, that's just not the law.

21           The -- the law on this is, I think, controlled by the  
22 Griffin case out of the Supreme Court.

23           Could we have Slide 16?

24           I understand it's -- it's a bit of a wordy slide, Your  
25 Honor, but ultimately any -- any error in legally correct or

1 allegedly inapplicable instructions is harmless. Jurors are  
2 not generally equipped to determine whether a particular theory  
3 of conviction in that case submitted to them is contrary to  
4 law, whether, for example, the action in question is protected  
5 by the Constitution is time barred or fails to come within the  
6 statutory definition of the crime. When, therefore, jurors  
7 have been left the option of relying upon a legally inadequate  
8 theory, there's no reason to think that their own intelligence  
9 and expertise will save them from that -- that error.

10 Quite the opposite is true, however, when they have  
11 been left the option of relying upon a factually inadequate  
12 theory since jurors are well equipped to analyze the evidence.

13 And that's precisely the case we have here. If, at  
14 worst, the jurors were presented with a legally correct  
15 statement of the law and the evidence doesn't rise to the  
16 level, which is why because the instruction was legally  
17 correct, a substantial evidence analysis would be needed to  
18 find that there were any harm from that instruction.

19 Another case -- the next slide is i4i. We saw this in  
20 the i4i, which is applying Fifth Circuit law. The Fifth  
21 Circuit law that the Federal Circuit applied in i4i, I believe,  
22 was this Walther case which goes back to that Griffin case in  
23 1991. That's the law. Again, you may have instructed on some  
24 legally correct secondary infringement-type theories -- well,  
25 even if the evidence doesn't rise to it, that you don't give a

1 new trial on that basis, you presume that they read and  
2 understand, but if it was a legally valid instruction and it  
3 was a factual issue that didn't rise to the level, that's  
4 not -- that doesn't rise to the level of a new trial.

5 And finally -- I'm sorry --

6 THE COURT: Go ahead.

7 MR. CALDWELL: Before I sit down, Your Honor, although  
8 the Court's new trial order contains multiple independent legal  
9 errors, in our view, that warrant reconsideration of the order,  
10 I think it's imposs -- it's really important to highlight what  
11 Apple's trying to do with a new trial order.

12 Apple doesn't just want to redo on -- on damages.  
13 They want to redo their whole damages model, we think, which I  
14 really don't understand. They basically want to -- based on  
15 our phone calls with them, it sounds like they want to disavow  
16 their old -- their old model and come in with something that I  
17 guess maybe they think would be more persuasive. They want to  
18 re-open fact discovery. They've been supplementing  
19 interrogatories, and they've been telling Your Honor that they  
20 need to retry infringement and validity.

21 They're seizing on this new trial order as some sort  
22 of a complete do-over. We -- we didn't win on any issues  
23 before. Let us just retry all of them. And respectfully,  
24 that's just not justice, and that's what I meant before when I  
25 was saying I -- I think Apple is trying to seize on this to



1 just have a complete do-over and treat the old case almost like  
2 it was an experimental mock trial. And this would utterly  
3 nullify the hard working jury that we had.

4 Thank you, Your Honor.

5 THE COURT: All right. Thank you, counsel. Before I  
6 hear from the Defendant in response, we're going to take a  
7 short recess. When we come back, I'll hear from the Defendant,  
8 both in regard to these status conference questions that were  
9 asked and their underlying arguments on the pending motion to  
10 reconsider.

11 We stand in recess.

12 COURT SECURITY OFFICER: All rise.

13 (Recess.)

14 COURT SECURITY OFFICER: All rise.

15 THE COURT: Be seated, please.

16 All right. Let me now hear from the Defendant.  
17 Before we get into the formal argument on the motion to  
18 reconsider -- Mr. Perry --

19 MR. PERRY: Thank you, Your Honor.

20 THE COURT: -- let me ask you some of the same  
21 questions I asked opposing counsel. I suspicion I'm going to  
22 get different answers, but where is your side of the case as  
23 far as being ready for a new trial on damages? What more do  
24 you anticipate? How long do you think a fair retrial on  
25 damages will take, those kind of questions. Let me have your

1 thoughts on those.

2 MR. PERRY: Thank you, Your Honor. And with the  
3 Court's indulgence, Mr. Lyon may address some of the timing  
4 questions, as well.

5 THE COURT: That will be fine.

6 MR. PERRY: We are waiting -- Apple is waiting, Your  
7 Honor, for the Smartflash new damages model report. We are  
8 going to respond to that, obviously, but we don't know what it  
9 is yet.

10 What we heard in open court this morning is the most  
11 information we've had about that since the Court's new trial  
12 order five weeks and two days ago. We have heard -- we've  
13 got -- we're not -- we don't have a new report. We've been  
14 given no preview of the new report, and, therefore, we are in  
15 reactive mode. We are in responsive mode.

16 Once we get the report, if it's tomorrow, as  
17 Mr. Caldwell said, we need time to respond to it. I think  
18 there will be Daubert challenges, but I don't know because I  
19 don't know what's in it. I'm a little bit hampered by -- in --  
20 in stating that definitively because we don't know what their  
21 theory is.

22 THE COURT: What's your -- what's your response to his  
23 statements that your position with regard to damages is going  
24 to be substantively different than your position in the earlier  
25 trial?

1 MR. PERRY: Well, I don't know if that's right because  
2 we're going to be responding to their report. Again, we --  
3 we -- we need them to go first. I do think that --

4 THE COURT: Well, your position is not totally  
5 responsive. I mean, you do have -- you are, I assume, going  
6 to respond to what they -- the position they take, but you're  
7 also going to affirmatively come forward with what -- with what  
8 you think the appropriate damages should be in the event the  
9 issues and the determinations of validity and infringement  
10 stand up.

11 MR. PERRY: Yes, Your Honor. But let me -- let me  
12 explain why there is a responsive element to that.

13 The -- the last time around, the Smartflash damages  
14 model was driven almost entirely by survey evidence. We heard  
15 this morning for the first time that they don't have a survey  
16 for this new model. That does change the Apple approach, and  
17 we -- we had planned to do a new survey to respond to whatever  
18 new survey Smartflash was going to do. That would come out of  
19 that. I mean, the -- the ultimate damages approach is there.

20 We have, of course, put forward the return on  
21 investment approach previously in the trial. We stand by that  
22 as -- as a -- as a methodology.

23 I believe Mr. Caldwell, if I heard him correctly this  
24 morning, proposed a licensing-based approach -- that is, what  
25 Smartflash was looking for in terms of licensing revenues -- I

1 think he had a per device licensing approach. If that is what  
2 Smartflash elects to do, I think in all fairness and justice,  
3 Apple would be entitled to put on a licensing-based approach  
4 showing what Apple pays for licenses for similar technology.  
5 But, again, we don't know what Smartflash is going to do, which  
6 is why I say we were in reactive or responsive mode.

7 We do know, as the Court observed a few minutes ago,  
8 that the world is not static. I would like to address  
9 Mr. Caldwell's backhanded attack on our supplementation of the  
10 interrogatory responses.

11 We have that obligation under the federal rules, as  
12 the Court is aware. We went through -- in light of the events  
13 that transpired at trial and the verdict -- we don't yet have  
14 their damages report -- and looked at whether there were  
15 previous factual issues that needed to be supplemented.

16 And, Your Honor, Apple is now -- in this case, has  
17 been adjudicated to infringe these patents. Our position has  
18 always been we don't infringe, as the Court is aware. That's  
19 behind us. We have an appeal ahead of us, but that's behind  
20 us.

21 Given that we are an adjudicated infringer, we have  
22 developed non-infringing alternatives. That should not  
23 surprise Smartflash, nor should it surprise the Court. What  
24 else could Apple do? If -- if we have a Court order against us  
25 that we are an infringer of these patents, we are obligated to

1 come and either license these patents or come up with a way  
2 around them.

3 We have come up with a number of ways around them. We  
4 have given those to Smartflash. Smartflash can take them into  
5 account, but we are not trying to change anything. We are  
6 responding to the verdict that was entered in this very case.

7 We have -- unless Smartflash's damages report raises  
8 other new issues, we have supplemented our fact discovery. I  
9 mean, that's -- we did that already without even a schedule in  
10 place because we want to keep -- keep things moving.

11 THE COURT: Didn't Apple previously stipulate that  
12 there were no infringing -- no non-infringing alternatives?

13 MR. PERRY: No, Your Honor. Apple's pre-trial  
14 interrogatory response was that Apple had not developed a  
15 non-infringing alternative at that time. And -- and we entered  
16 into a trial stipulation that Apple didn't have it.

17 THE COURT: Okay.

18 MR. PERRY: Another intervening event is that  
19 Dr. Jones, the Smartflash expert, then testified, as the Court  
20 will recall, at the trial regarding non-infringing  
21 alternatives including, for example, the reversing the order of  
22 the payment step in which -- based on that testimony, that  
23 trial testimony that didn't exist before trial, Apple's  
24 engineers have looked at alternatives in light of the --  
25 Smartflash's own approach

1 to this case. And that's directly relevant to damages, as  
2 Mr. Cassady acknowledged in the last hearing on this subject.

3 As far as the -- you know, where do we go from here,  
4 I think of everything I've heard this morning, I agree with  
5 Mr. Caldwell on one point, which is I think this is a three-day  
6 retrial --

7 THE COURT: Okay.

8 MR. PERRY: -- start to finish. So I think we have at  
9 least agreement on that.

10 October, I think, is overly ambitious, to be quite  
11 honest, Your Honor. We don't have their damages report yet.  
12 They've had five weeks to prepare it. You know, I'm not going  
13 to say we need exactly the same amount to respond to it, but it  
14 wouldn't be out of bounds for us to ask for that. I also think  
15 there's going to be a round of motion practice after that.

16 We also have some witness availability issues. You  
17 know, setting a trial in September or October, Apple's expert  
18 witnesses are engaged in many other lawsuits for many other  
19 companies and -- and individuals, some in this Court, and  
20 they're not -- they're not all available at any given date.

21 You know, if -- if we put it more out to early 2016,  
22 we solve those problems. If we put it to later 2015, we solve  
23 most of those problems. But I'm just -- whatever date the  
24 Court picks or the parties settle on, we would have to perhaps  
25 ask the Court's indulgence or Smartflash's indulgence as to

1 expert availability which is something beyond Apple's control.  
2 If we get out to 2016, that -- that becomes a non -- non-issue.

3 THE COURT: Do this for me, Mr. Perry, try to slow the  
4 rapidity of your speech just a little bit.

5 MR. PERRY: I -- I always have that problem. I  
6 actually wrote on my pad today, Your Honor, remembering last  
7 week or the last time we were here, slow down. So I need to  
8 look down, as well.

9 Other questions about preliminaries?

10 THE COURT: No, I'll -- I'll hear your responsive  
11 arguments to the motion to reconsider.

12 MR. PERRY: Thank you, Your Honor.

13 THE COURT: We may talk slow in the South, and we may  
14 hear slow in the South. I don't concede that we think slow in  
15 the South.

16 MR. PERRY: I -- I don't think anybody in this  
17 courtroom would -- would have any -- any thoughts along those  
18 lines, Your Honor.

19 THE COURT: Whenever you're ready.

20 MR. PERRY: Thank you, sir.

21 We've heard Mr. Caldwell's argument this morning on  
22 the appropriateness of the previous damages model. There was  
23 nothing new there. That was the reprieve of the argument we  
24 had at the post-trial hearing. We're here on a motion for  
25 reconsideration. Just procedurally, there's no new evidence.

1 There's no new law. There's no change in circumstances.  
2 There's -- nothing has changed since the Court entered its  
3 order.

4 The Court -- you know, 59(d) is in the rules to  
5 account for this situation. The parties were on notice. We  
6 argued it. We've made that procedural point. The Court has  
7 enforced it against Apple with respect to the 101 issue. We  
8 suggest it should be forced against Smartflash, as well, but  
9 the issue has been decided, let's move along.

10 On the merits. To this day, Your Honor, Smartflash  
11 does not argue that the EMVR instruction that was actually  
12 given to the jury was warranted because this was an EMVR case.  
13 They don't make that argument. They don't say that this was a  
14 straight up LaserDynamics, Ericsson-compliant situation, we  
15 jumped through all the hoops of the EMVR, and, therefore, we're  
16 entitled to the EMVR instruction.

17 What Smartflash's position is, is that the stock EMVR  
18 instruction, which is absolutely correct. We -- everyone in  
19 this courtroom also agrees on this point. In an -- in an  
20 actual EMVR case, that -- that instruction describes the law,  
21 as explained in LaserDynamics.

22 Smartflash's position is they were entitled to that  
23 because their survey evidence supposedly showed that some  
24 sub-population of consumers were interested in not the patented  
25 invention but the features that were made possible by the



1 patented invention, a point they always skip over that's --  
2 that's very important.

3 Our argument has always been, Your Honor, that  
4 applying the EMVR to a subset of a case introduces all the  
5 dangers with none of the benefits of the EMVR. And we have to  
6 back up and remember what the basic rule is. And as the Court  
7 observed earlier, Judge O'Malley's opinion in Ericsson is very  
8 instructive on this.

9 The basic rule -- the rule in 99 percent probably of  
10 patent cases involving multi-component products is the  
11 Plaintiff has to apportion the damages to the value added by  
12 the patented invention -- basic rule.

13 The exception, the narrow limited exception is  
14 the Entire Market Value Rule. The Court asked my friend,  
15 Mr. Caldwell, this morning, what Federal Circuit case allows a  
16 Plaintiff to mix and match, to combine, to take one from Column  
17 A and one from Column B to say for 77 percent of consumers,  
18 it's apportionment and for 23 percent of consumers, it's EMVR.  
19 I didn't hear him answer that question, Your Honor. He may  
20 have. I may not have heard it.

21 But the answer is there is no such case. There is not  
22 a single case in the history of the Federal Circuit that has  
23 mixed and matched apportionment with EMVR. It's because the  
24 two approaches to damages -- one is not the implementation of  
25 the other. One is the alternative to the other. It's a light

1 switch. The EMVR is either on or it's off. And in most cases,  
2 99 percent of cases, it's off.

3 There's an evidentiary reason for that strict  
4 limitation. Judge O'Malley explained this. LaserDynamics  
5 explained this. It is that the EMVR, by its nature, allows the  
6 Plaintiff to give the jury the total revenues of a  
7 multi-component device.

8 That is inherently prejudicial because the jury, given  
9 information, will use it, could use it, may use it to calculate  
10 the damages owing to that Plaintiff.

11 In the rare case of an EMVR, that's okay because by  
12 hypothesis or by definition, the patented invention drives the  
13 demand -- the entire demand for the product, and, therefore,  
14 all the revenues can be considered by the jury.

15 But what we have here, this mix and match theory, this  
16 Chinese menu theory, what happens is for 77 percent -- you  
17 know, even taking their evidence which has its own problems,  
18 which I'll talk about, but even taking their evidence on its  
19 face, we know 77 percent of the consuming public doesn't have  
20 the demand driven by this patented invention. Yet the jury is  
21 still given that dangerous tool, the total revenues from the  
22 product.

23 Mr. Caldwell says, well, they were never told it's  
24 187 million (sic). They were told it was 43 billion for 23  
25 percent.

1 I would suggest, Your Honor, that jurors in East Texas  
2 may talk slow and listen slow, but they can multiply by four,  
3 as well. And having that information before them, they knew  
4 exactly what the total revenues of these products were. And  
5 that's why mix and match doesn't work. It's because it injects  
6 into the case the very prejudicial evidence that the EMVR  
7 limitation is designed to keep out.

8 Now, is it possible to construct a case that  
9 knowing that the Court by instruction or limiting -- limiting  
10 instructions or otherwise could cabin it to the 23 percent  
11 and -- and insulate the 77 percent? I doubt it. I think it  
12 would be very hard because once the toothpaste is out of the  
13 tube, it's lying on the table.

14 But the reality is there was no such instruction given  
15 here. The EMVR instruction that was actually given, it says,  
16 quote, if you find that Smartflash has proven by a  
17 preponderance of the evidence that the demand for Apple's  
18 accused products is alone motivated by the patented invention,  
19 then you may award damages based on the entire value of those  
20 accused products.

21 In its reply brief -- that's from the transcript, Your  
22 Honor, of February 24th, at Page 62.

23 In the reply brief in a footnote, Smartflash  
24 acknowledges that that instruction can be read exactly as Apple  
25 reads it -- that is, that if you find that the -- that the

1 demand was driven for any of those products, you can award  
2 damages based on all of them. And that's the concern. There  
3 was never an instruction that limited that piece of it to this  
4 sub-population that they now create.

5           So that even if there were a sub-population aspect,  
6 which we dispute as a matter of law, the instruction actually  
7 given didn't give the jury the tools necessary to limit their  
8 consideration of the entire market value approach to that  
9 sub-population. That was --

10           THE COURT: When you say earlier that could -- could a  
11 Court hypothetically cabin the information as to the entire  
12 revenue in such a way as to limit it to, in this analogy, the  
13 23 percent and insulate the 77 percent, when you say I doubt  
14 it, I take that to mean, counsel, you don't know because I'm  
15 sure and I'm confident if you had a case that said you  
16 couldn't, you'd be waving it in front of me.

17           MR. PERRY: Well, the -- the issue has never arisen,  
18 Your Honor. That's exactly right. The -- the mix and match --

19           THE COURT: So you're aware of no authority on that  
20 precise point?

21           MR. PERRY: Either way, that's correct.

22           THE COURT: Okay.

23           MR. PERRY: The mix and match theory is, as far as I  
24 know, unique to this case. I think it's foreclosed by general  
25 EMVR principles. If we start with the more basic proposition

1 that either the EMVR is on or it's off, it's a light switch,  
2 you never get to that problem. You never get to the limit one  
3 part of the case to the EMVR and another part to apportionment  
4 because you've already gone a step beyond what the law allows,  
5 which is you either have the EMVR or you don't, we would  
6 submit.

7 THE COURT: Let me ask this question. Given the  
8 argument that I've heard from Plaintiff today and given the  
9 position they've staked out in their briefing, coupled with  
10 your admission that there's not any guiding authority on this  
11 at present, what's your response to the notion of seeking  
12 guidance on an interlocutory basis from the appellate Court on  
13 that issue before we go to the expense and trouble of retrying  
14 damages?

15 MR. PERRY: Your Honor, we would submit three things.  
16 First, the requirements for 1292(b) certification aren't made.  
17 This is a -- a -- there is a legal issue here, but it is one  
18 that is of the Plaintiffs' own making that's not novel at all.

19 The first step, as I said, the inapplicability of the  
20 EMVR is not a hard question at all, and it should never have  
21 come into this case. That's not something on which reasonable  
22 jurists could -- could disagree, we would submit.

23 Second, it wouldn't advance the ultimate termination  
24 of the litigation, which is the other requirement, of course,  
25 of 1292(b) certification. The -- the Plaintiffs are going to

1 have to do a new damages model anyway, if this is wrong, as we  
2 submit it is, both as to an instructional matter and as a more  
3 substantive doctrinal matter. I mean, it's not -- we heard a  
4 lot about the instruction today. We heard very little about  
5 the underlying problems with this method.

6           They -- they asked the wrong questions, and they drew  
7 the wrong conclusions from them, and they presented the wrong  
8 model to the jury, as I think the Court has -- has indicated  
9 some concerns with that model, and rightly so.

10           The proprietary of the model isn't properly up for  
11 interlocutory review, but it is the driver of this question  
12 about the mix and match of the EMVR. Even if that's in the  
13 abstract a legal question, it is intertwined with the validity  
14 of their model which we submit standing alone requires a new  
15 trial.

16           In other words, whatever the Court might think about  
17 the EMVR instruction or the applicability of the EMVR in this  
18 case, if the Court were to either accept Mr. Caldwell's  
19 argument today or even think about certifying it, we submit the  
20 Court would have to make a resolution as to the propriety of  
21 the model, an issue the Court essentially put off or put on --  
22 put on Smartflash in light of the current order because of the  
23 instruction.

24           So it -- it wouldn't solve the problem of the  
25 underlying defect in the Smartflash approach.

1           It's also -- we do have this Gasoline Products issue.  
2 Mr. Caldwell spoke rather derisively of it, but it -- it is a  
3 constitutional dimension. We talked about it last time, that a  
4 new trial on damages or even issues similar to the damages are  
5 not divorceable as a matter of law from liability in every  
6 case.

7           The Court, again, in its order deferred ruling on that  
8 issue on the theory that Smartflash would come up with a new  
9 damages model that moots that concern. We'll take the Court  
10 and Smartflash -- you know, that that is possible. I told you  
11 last time it was possible. If they do that, then that comes  
12 out of the case. But if they don't -- if they stand on this  
13 model, we absolutely have that problem. And then you've got  
14 the whole case issue. We -- we don't have a final ruling in  
15 the case is the problem because of the way these damages issues  
16 were tried.

17           THE COURT: All right. Let's get back to the  
18 remainder of your response to their motion to reconsider.

19           MR. PERRY: Your Honor, I'll -- I'll be brief on it,  
20 unless the Court has specific questions.

21           There was no legal basis for the entire market value  
22 instruction. This is not a case in which a -- a factually  
23 inapposite instruction was just sort of floating around in the  
24 air, and, therefore, we can assume the jury disregarded it.  
25 This was a case in which the jury was given the tool that the

1 EMVR is designed to preclude, that is, the total revenues  
2 figure, and an instruction that authorized them to use that  
3 tool and a verdict that makes clear they did use that tool.

4 To suggest that it was harmless to give them an EMVR  
5 instruction upon this record ignores what actually happened in  
6 the trial, we would submit. It is, in fact, the case that this  
7 is not -- it should not have been an EMVR case in whole or in  
8 part. We pointed this out in our post-trial motions, which is  
9 why I think that the Smartflash first response is you're right,  
10 this is not an EMVR case. They said that four times in their  
11 post-trial response brief, with no qualification. Therefore,  
12 the instruction is clearly wrong.

13 Now, in this motion for reconsideration, they say,  
14 well, it's partly -- it's a 23 percent EMVR case, and,  
15 therefore, the instruction was okay, but it's not a 23  
16 percent instruction, it's a hundred percent instruction. You  
17 know, you -- you know, it doesn't -- the -- the current  
18 argument doesn't match up with what the jury was told, so  
19 there's no harmless error there. It was simply an incorrect  
20 instruction.

21 And underlying all of that, as I said, is the problem  
22 with the damages model, the problem -- you can't have a mix and  
23 match EMVR -- an -- an apportionment in the first place, and,  
24 moreover, as to the EMVR piece, Smartflash didn't do it right.

25 Alone motivate is not a verb, Your Honor. What



1 LaserDynamics says is that the patented feature alone, pause,  
2 must motivate the purchase. The patented invention alone has  
3 to be the motivating driver of the purchase of the -- of the  
4 multi-component invention.

5 Smartflash never proved that. They asked this obscure  
6 survey question that -- that did not isolate the value of the  
7 patented invention. Rather, what they said is does the ability  
8 to download apps or to download movies alone motivate your  
9 purchase? That's not the patented invention.

10 We had this argument before. I'm not going to repeat  
11 myself. It's in the transcript from the post-trial hearing.  
12 The patented invention is a very limited method of payment for  
13 content.

14 The survey questions tested the functionality of  
15 downloading apps and movies. There is no evidence that the  
16 patented invention drove the demand for even a single iPhone,  
17 iPad, or iPod, much less 23 percent of them.

18 THE COURT: Before you -- before you get any further,  
19 let me back up a minute.

20 With regard to the instruction that was given to the  
21 jury and in light of your argument that it wasn't harmless and  
22 that it was, in fact, harmful, how do I square that with the  
23 reality that it was Apple that asked for that instruction at  
24 the trial, and it was Apple that argued for it over the  
25 objection of Smartflash?

1 MR. PERRY: Your Honor --

2 THE COURT: Do you -- are you -- are you getting it  
3 both ways by saying we wanted it at the trial, but now we want  
4 to say it was harmful and shouldn't have been given and was  
5 error?

6 MR. PERRY: Absolutely not, Your Honor.

7 THE COURT: Okay.

8 MR. PERRY: At the Rule 50(a) stage, at the conclusion  
9 of evidence at trial, Apple made the same argument I'm making  
10 today, which is this is not an EMVR case. EMVR should be out  
11 of this case. There should be no reference to EMVR total  
12 revenues or anything else. We also made that in our Daubert  
13 motions and before trial.

14 THE COURT: Well, counsel, you weren't at the trial.

15 MR. PERRY: No.

16 THE COURT: I was at the trial. This instruction was  
17 of Apple's request.

18 MR. PERRY: I -- Your Honor, I -- I'm -- I'm answering  
19 the Court's question in steps, if I may.

20 THE COURT: All right.

21 MR. PERRY: At the 50(a) conference, Apple objected to  
22 anything having to do with EMVR, and the Court overruled that  
23 objection, denying the 50(a) motion. And the case went forward  
24 on the Plaintiffs' quasi hybrid made up EMVR theory.

25 Given that the Court had rejected Apple's legal

1 argument that EMVR cannot be submitted to the jury, Apple  
2 proposed a legally sufficient -- a legally accurate EMVR  
3 instruction at the beginning of the charge conference I was not  
4 at, which I have read, though, Your Honor -- and the Court may  
5 recall Apple specifically reserved all objections previously  
6 made, including at the Rule 50 conference, that it was offering  
7 those instructions over the Court's denial of the previous  
8 motion because once the Court has ruled, the Court has ruled,  
9 and Apple has to take those things into account.

10 Therefore, Apple has never waived the objection that  
11 this is not an EMVR case, that the EMVR evidence was improperly  
12 introduced, that the -- that the whole -- the whole construct  
13 was wrong. That has been Apple's consistent theory through the  
14 entire case.

15 The instruction -- there is a problem with the  
16 instruction. As the Court may recall, both Apple and  
17 Smartflash objected to the apportionment on EMVR instructions  
18 but for different reasons. One refers to the patented feature,  
19 and one refers to the patented invention. And there's an  
20 inconsistency between the two.

21 There's also not any segregation -- a differentiation  
22 between the two theories, as Mr. Caldwell is now arguing. In  
23 other words, there wasn't a -- for 77 percent, take this  
24 apportionment, and for 23 percent, take this. That is another  
25 problem.

1           So that -- and I think the Court in the new trial  
2 order pointed out that Apple proposed the instruction. And,  
3 again, the instruction is not legally erroneous. In an EMVR  
4 case, that is the instruction that should be given. We agree  
5 with that.

6           This is not an EMVR case. Apple has made that point  
7 before trial, during trial, after trial, today. That's the  
8 problem with the instruction. It's not that it -- that  
9 standing alone it's a legally incorrect instruction, but that  
10 there's not legally sufficient evidence to warrant it here.

11           Or to put it in the terms of the i4i case that my  
12 friend, Mr. Caldwell, talked about, the legal theory on which  
13 the case went to the jury was itself deficient. It was legally  
14 deficient. It never should have gone on that basis. That's  
15 the definition of harmful error in instructions, and that's the  
16 problem here.

17           It's the reason, Your Honor, that the substantive  
18 aspects of the model are related to the instructional error.  
19 It's -- it's that this case proceeded on the wrong approach.

20           THE COURT: All right. I understand your response.

21           MR. PERRY: Thank you, Your Honor.

22           THE COURT: Let's return to the remainder of your  
23 argument on the motion.

24           MR. PERRY: Your Honor, I'll wrap up briefly with this  
25 point that comes out of what I was just saying. Setting

1 instructional error aside or assigning as harmless error that  
2 instruction, the defects in the damages model independently  
3 warrant a new trial. There was no legally sufficient evidence  
4 on which a jury could base a royalty determination on the  
5 entire value of a single device, let alone 23 percent or a  
6 hundred percent of the devices.

7           There was no legally sufficient evidence on which a  
8 reasonable jury could base any royalty award on the value or  
9 the revenues of the accused devices. That is the fundamental  
10 failure in Smartflash's case. That is what requires a new  
11 trial on damages, everything else aside.

12           It requires the Entire Market Value Rule applied in  
13 whole or in part. And for this part of my argument, I'm not  
14 waiving the rest, but let's assume it could apply in part. It  
15 would still require legally sufficient evidence that the  
16 patented invention drove the entirety of consumer demand for a  
17 multi-function device. There is no legally sufficient evidence  
18 of that point in this record as to a single phone, a single  
19 iPod, a single iPad. That requires a new trial right there  
20 because the jury clearly was instructed that it could do it.

21           The Court, we submit, Your Honor, should adhere to its  
22 instructions that Smartflash should come up with a new and  
23 materially different damages model for the new trial. I was  
24 actually very pleased to hear Mr. Caldwell tell us all this  
25 morning that Smartflash has developed what he called a

1 fundamentally different model that works a different way.

2 We haven't seen it yet. It may or may not have  
3 problems. It may be perfectly acceptable. We don't know. We  
4 haven't seen it. But it's different, and that's an important  
5 thing. That ruling should be sustained.

6 THE COURT: Do you want to bet that you'll find  
7 something to complain about when you see it?

8 MR. PERRY: I won't take that bet, Your Honor, today,  
9 but I haven't seen it, so we don't know.

10 That ruling should be sustained. There's been no --  
11 no basis offered to reconsider that ruling. We should set a  
12 reasonable schedule to get us all to a new trial with time for  
13 responsive experts and depositions and Daubert motions, if  
14 warranted. And, again, I'll bet, yes, we will have a Daubert  
15 challenge to their approach. I don't know that, but I'll bet  
16 so.

17 A quick --

18 THE COURT: And I won't -- I won't take that bet  
19 either.

20 MR. PERRY: Fair enough.

21 THE COURT: Go ahead.

22 MR. PERRY: Unless the Court has further questions on  
23 the substance of the motion for reconsideration, I would like  
24 to just address briefly the bifurcated appeal proposal.

25 THE COURT: Go ahead.

1 MR. PERRY: Thank you, Your Honor.

2 Your Honor, the Robert Bosch case from the Federal  
3 Circuit recognizes a limited and unusual procedure by which  
4 damages issues can be set -- bifurcated and -- and dealt with  
5 separately if all liability issues have been finally determined  
6 in a case.

7 The request for bifurcation in this case is premature.  
8 All liability issues have not been finally determined. The  
9 Court still has pending both Apple's and Smartflash's  
10 post-trial motions on infringement, validity, remedies, and so  
11 forth, so that -- that -- that we're not even at the point that  
12 the Court could consider a Bosch bifurcation order.

13 It is discretionary, if -- if the Court got to that  
14 point, and I understand the Court will -- will rule on those  
15 motions in due course, then the question to bifurcate is  
16 discretionary with the Court.

17 The Court doesn't have to do it and would need  
18 persuading that it would be appropriate in a particular case.  
19 It is an available procedure, we acknowledge that, but we  
20 submit that Smartflash hasn't made out a case for why that  
21 discretion should be exercised here. They just assume it.

22 We have a couple of concerns, substantive concerns  
23 with bifurcation here. One is the Gasoline Products problem.  
24 The Federal Circuit has made clear that bifurcation cannot be  
25 employed where there is a -- an intertwinement of damages and

1 liability because the Seventh Amendment then jumps into play.

2           We have raised that concern already with the new trial  
3 order. The Court has ordered Smartflash to come up with a new  
4 damages model that meets that issue. If they do, that's fine;  
5 but, again, we have a prematurity problem, which means we could  
6 not -- we can't even opine on bifurcation without knowing  
7 whether or not and how the Gasoline Products objection is going  
8 to be resolved.

9           The third or another substantive concern is the  
10 parallel universe in which the Court is aware of the PTAB.  
11 The -- the proceedings in this Court will continue. We  
12 understand that. And we are making every effort to -- to do  
13 that, but for the Court to -- to jump this case ahead of the  
14 PTAB, we submit would be going beyond simply denying a stay but  
15 also moving the case in a way that Congress doesn't intend,  
16 that that proceeding is going forward on a statutory schedule,  
17 it ought to continue to do that, and this case should go  
18 forward on its own schedule.

19           Most -- most fundamentally, and this applies really to  
20 the bifurcation issue, as well as the inapposite request for  
21 1292(b) certification, this case should stay together. This is  
22 an integrated request for remedies for patent infringement.

23           Smartflash has come forward and asserted certain  
24 claims against Apple, accused Apple of infringement, has now  
25 secured a verdict of that, has established the validity of



1 those claims, and we have yet to determine the -- the -- the  
2 remedies that -- that are owing to Smartflash as a result of  
3 that adjudicated infringement.

4           It would be better for this Court, we submit, it would  
5 be better for the Federal Circuit, it would be better for the  
6 parties to get all of that wrapped up so that when it's done,  
7 everything can go to the Circuit at the same time, and the  
8 Court can look at everything. Hopefully we've all done it  
9 right at that point, or whatever needs to come back will come  
10 back at one point. But if some part of it goes up, we're going  
11 to have this ping pong game with multiple balls. You know,  
12 we're going to have a damages trial going on here while the --  
13 while the liability issue is up in the Federal Circuit. We get  
14 something reversed on liability or just -- even just changed  
15 and remanded on liability, we have to come back and do that  
16 over. Are we then going to have a third damages trial or maybe  
17 a fourth damages trial? I mean, really, it multiplies the  
18 proceedings unnecessarily, the cost, expense, the jurors of  
19 this district having to come back over and over again for these  
20 parties, whereas as if we keep the case together in this court  
21 until it's done, which, again, the 99 percent rule generally  
22 has some -- some appeal. You know, the way that cases are  
23 usually handled, keep them all together until it's ready for a  
24 final judgment to be entered ought to apply here because  
25 there's nothing about this case that Smartflash has offered or

1 that we're aware of that would -- that would warrant the  
2 extraordinary unusual bifurcation kind of request that they're  
3 making. It should just stay together. Once there's a final  
4 judgment, whoever is aggrieved, we'll take it up, and -- and  
5 we'll be done.

6 THE COURT: All right. What else do you have?

7 MR. PERRY: Your Honor, unless the Court has  
8 questions, our -- our Apple submission is that the motion for  
9 reconsideration should be denied as to the new trial. We  
10 should have a -- a date certain for a new trial. Smartflash  
11 can give us its damages model on an appropriate schedule, the  
12 parties can negotiate the rest, and all the appeal requests  
13 should be denied, and we can move on.

14 Thank you, Your Honor.

15 THE COURT: Thank you, counsel.

16 Mr. Caldwell.

17 MR. CALDWELL: May I reply, Your Honor? Thank you.

18 THE COURT: It's going to have to be brief.

19 MR. CALDWELL: Yes, sir.

20 Your Honor, it sounds like Apple is basically morphing  
21 off the -- what I understand to be the basis of the new trial,  
22 and now the focus is kind of back to, well, we don't like these  
23 survey questions which we think are weight issues, and, oh, now  
24 the instruction actually told them to look at a hundred percent  
25 of the revenue, even though that wasn't really presented.

1           Again, on this point, which I won't belabor by any  
2 means, but anytime we said the MVR didn't apply, if you look in  
3 context, we were talking to the -- talking about the total  
4 revenue. And we didn't think that applied, and now Apple is  
5 saying that the instruction you gave was a total revenue  
6 instruction. But that just doesn't make sense in context  
7 and --

8           THE COURT: All right. And you need to slow down,  
9 too, Mr. Caldwell.

10          MR. CALDWELL: Yes, Your Honor.

11          THE COURT: Go ahead.

12          MR. CALDWELL: That just doesn't make sense in  
13 context. It absolutely doesn't say that, and I'll show you why  
14 here in just a second.

15           The instruction was warranted on this case, as tried,  
16 after the motion to strike ruling and the -- the redoing of the  
17 survey.

18           You asked a question to counsel -- or it was a  
19 question in part directed to me earlier, and I think it was  
20 followed up on with Mr. Perry. I'd like to look at the  
21 Garretson case for a minute.

22           If we could go to Slide 5.

23           The question -- paraphrasing anyhow -- was basically  
24 this notion of are we looking at the entire market or the --  
25 essentially the entire market value of a product -- of a

1 product, of an item sold. And I think if we go back to  
2 Garretson, we don't have to stop there since Your Honor  
3 observed kind of the more recency of -- of Ericsson, but I  
4 think when we go back to even Garretson, what we saw --  
5 starting about halfway, the profits and damages are to be  
6 calculated on the whole machine for the reason that the entire  
7 value of the whole machine as a marketable article is properly  
8 and legally attributable to the patented feature.

9 And I think that's why there's this point that  
10 we've -- that we've made that what we did is entirely  
11 appropriate because you're saying that for however many sales  
12 of the machine you can say that the entire value of that  
13 particular whole machine was properly and legally attributable  
14 to the patented feature, then you can look at that revenue as  
15 the base. And -- and so the suggestion that the case law  
16 doesn't support it, we disagree with.

17 Go to the -- the next slide, if we could.

18 LaserDynamics, I think, because of the facts that were  
19 before them, it's maybe a little less clear on this point, but  
20 I -- I think it's not inconsistent with the read that we're  
21 presenting to you. Again, when it's -- it's -- in this  
22 instance, instead of saying the words "the marketable article,"  
23 it was that marketable article sold. In this instance, it's  
24 talking about a laptop computer.

25 But Your Honor mentioned Ericsson, and I'd like to

1 jump forward to Slide 9, if we could.

2 Ericsson actually goes back to just what I was reading  
3 from Garretson. So in this Ericsson opinion, again, where the  
4 entire value of a machine as a marketable article is properly  
5 and legally attributable to the patented feature, the damages  
6 owed to the patentee may be calculated by a reference to that  
7 value. And -- and at this point, I think -- I think that this  
8 very much supports our interpretation of a proper way to apply  
9 the Entire Market Value Rule as not merely that you could look  
10 at the entire market, which I don't dispute that that is one  
11 way that it can apply. We're on absolutely the same page as  
12 far as that goes.

13 But also, as we see from Ericsson, you can also look  
14 at the entire value of a machine as a marketable article. And  
15 that's what we did. The articles as to whether the question  
16 was sufficient and whatnot, I mean, these are weight issues.  
17 They're subject to vigorous cross-examination. Quite analogous  
18 to Your Honor's ruling in ContentGuard on Thursday.

19 Jumping forward to the instruction, if we can go to  
20 Slide 14.

21 Mr. Perry said that your instruction basically told  
22 the jury -- I'm trying to quote, but don't -- my apologies if I  
23 get any words wrong, but basically said your instruction says  
24 if any of the articles satisfy the alone motivated, you can  
25 base on all the revenue. Your instruction plainly does not say

1 that, Your Honor. And if it does, I suspect Apple would have  
2 pitched a fit at the formal charge conference if it said that,  
3 and we'd have been, well, heck, if that's true, why can't I  
4 show the 187 billion. That's not what it says at all.

5           It -- the instruction specifically tells you, you get  
6 recovery of damages based on the value of an entire product  
7 that has multiple features only when the patented invention  
8 constitutes the basis for consumer demand. And accordingly, if  
9 you find that Smartflash has proven by a preponderance of the  
10 evidence that the demand for Apple's accused products is alone  
11 motivated by the patented invention, then you may award damages  
12 based on the entire value of those accused products.

13           Also, however, if you find that consumer demand for  
14 the products is not based solely on the patented invention, you  
15 should not -- you should award damages based on the value of  
16 the patented invention and not the entire value of the accused  
17 products.

18           It was quite clear that the new interpretation of your  
19 instruction that Apple's advancing now, which as I understand  
20 wasn't even the basis of the new trial order, is just not the  
21 correct read. And it's extraordinarily not the correct read in  
22 view of the context in which the case was tried.

23           Slight non sequitur, but on the 1292(b) issue, the  
24 certification of this question for interlocutory appeal under  
25 1292(b) is absolutely met in this case where you have a

1 controlling question of law, which we've debated amply,  
2 substantial ground for difference of opinion, immediate appeal  
3 may materially advance the ultimate determination of the  
4 litigation.

5 And the observation from Apple that it might be that  
6 you still have to come back and retry damages doesn't negate  
7 the fact that absolutely the test is met, that you may  
8 materially advance the ultimate determination of the litigation  
9 on this question.

10 THE COURT: Was that -- was that addressed at all by  
11 the Federal Circuit during your argument on the stay matter?

12 MR. CALDWELL: I -- I don't think so, Your Honor. I  
13 think -- I think that because of how it -- how it came up, I  
14 think Judge O'Malley asked a question maybe to Mr. Perry about  
15 whether, well, couldn't Apple take this path and -- and try and  
16 get the liability issues up? And then when I was at the -- the  
17 lectern, I believe she asked me the same question, and -- and I  
18 said yes. And then in the footnote that we have, I didn't have  
19 a slide on this, but I think maybe it's helpful just to observe  
20 the footnote that the Federal Circuit put, which I -- to answer  
21 your question, I don't think it's on the 1292(b) per se because  
22 her focus was on kind of timing as to liability, more on the  
23 point that Mr. Perry is saying, but we're entitled to have the  
24 PTAB go first. And I think she's saying quite the opposite.  
25 There's no reason that this can't be a perfectly streamlined

1 way to get liability to the Court.

2           The Court said, under our jurisprudence, the damages  
3 proceeding could be bifurcated form the liability determination  
4 such that we could review an appeal from the district court  
5 even though the damages determination is still outstanding.  
6 She's actually focusing on the liability.

7           And I think our observation is, well, the 1292(b) test  
8 is certainly met, and it seems like you'd have a pretty good  
9 chance of the Federal Circuit saying, yes, we will consider  
10 that on an interlocutory appeal while they're already having to  
11 dig into liability issues if we follow the suggestion of the  
12 Court.

13           And so it seems like the test for 1292 is met, and  
14 the -- our sort of motivations for why it maybe even makes  
15 sense are -- are unusually high in this case where at the  
16 Court's suggestion we might send up liability.

17           I heard counsel for Apple say something along the  
18 lines that no reasonable jurist would say that an aspect of  
19 EMVR applies or something similar here. I mean, I just cannot  
20 figure out how to reconcile that with what has happened. I --  
21 I absolutely understand that Your Honor raised something sua  
22 sponte, something that is bothering Your Honor, and Your Honor  
23 had doubts about is how it was expressed, if I recall  
24 correctly, and we took a hearing on it. And it -- it may be  
25 something on which we differ, but the notion that no reasonable



1 jurist could have possibly gotten there strikes me as super  
2 bizarre given that Apple got exactly what it wanted by telling  
3 the Court we -- Smartflash has put forward a model using entire  
4 market value on a sub-population.

5 And so at times, those unreasonable jurists have  
6 included Apple itself, Smartflash, once we lost that and  
7 pursued different evidence, and the Court system. How we got  
8 here, it's just -- I don't know any other way to say it than it  
9 just strikes me as fundamentally unjust that we did everything  
10 that Apple kind of told us we needed to do to make it  
11 appropriate to make it both EMVR for the sub-population and  
12 apportionment of the base.

13 Is that Slide 4, if you don't mind.

14 I mean, remember this is exactly what Apple was  
15 telling us at the bottom here. For Mr. Mills' apportionment of  
16 the base to have been proper, the relied on survey question  
17 would have needed to ask whether the patented feature alone  
18 motivated the purchase.

19 My recollection -- you wouldn't want a slide that  
20 would look like this -- but my recollection was that's  
21 basically at the tail end of a paragraph that spans about  
22 two-thirds of a page and cites LaserDynamics multiple times.

23 And for the notion that we are going to apply the EMVR  
24 test for this apportionment, supporting this same thing with  
25 the exact -- the same position that Smartflash has right now

1 that what we did was use a sub-population application of the  
2 Entire Market Value Rule.

3 THE COURT: Are you -- are you saying that Apple  
4 suggested to you that applying the Entire Market Value Rule to  
5 a sub-population of the consuming public was what you should do  
6 in this case?

7 MR. CALDWELL: Well, I guess -- I guess it depends  
8 temporally where we're looking at it. We had done what we  
9 thought was the original model or what was the original model  
10 which did not invoke looking at the entire market.

11 THE COURT: I think everybody will agree that from  
12 where you started and where we are today is not a straight  
13 line.

14 MR. CALDWELL: Right, right. But -- but what -- what  
15 I'm saying is prior to that certainly -- certainly not, okay?  
16 That wasn't some sort of suggestion by Apple. But through its  
17 motion to strike, Apple said, all right, if this is going to be  
18 your base, here's how you have to ask it. And that's what  
19 appears to have persuaded Judge Mitchell, based on the hearing  
20 and the -- the argument. And so in that sense, I would answer  
21 your question, yes. I mean, this is what will solve -- this is  
22 what will solve your problem in how you've apportioned your  
23 base, using this -- this test out of the Entire Market Value  
24 Rule.

25 And we had doubts as to whether we had to go to the

1 level of asking alone, but once we did that, at Apple's  
2 request -- I mean, absolutely they suggested it, and -- and  
3 almost -- they effectively got us ordered to have to do it.

4 I'll yield the microphone here in just one second. I  
5 think in sum, though, for reasons that I won't repeat, you  
6 understand we -- Smartflash absolutely believes a new trial  
7 order was error and judgment should be entered on -- on the  
8 first verdict with resolution of the other pending JMOLs on  
9 infringement and validity, and that the whole case should just  
10 go to final judgment and should go up on appeal, and if there's  
11 a problem, it can be dealt with.

12 But we don't believe there is a problem. We -- we  
13 believe the jury was properly instructed, and we don't frankly  
14 believe that Apple can go up there and challenge that  
15 instruction.

16 I mean, I realize there's the goal of the Court  
17 wanting to get things right, and I -- I don't dispute that at  
18 all, but we think you did, and we feel like Apple can't really  
19 be heard to say otherwise, given exactly how this record  
20 developed.

21 But if the Court disagrees and doesn't agree with that  
22 approach, bifurcation and appeal makes sense. It -- it was --  
23 you know, I think there's a reason Judge O'Malley suggested it.  
24 She's understanding that in the context of analyzing the  
25 Court's stay order and just all the different moving parts,

1 it's actually a very streamlined way to get resolution on a lot  
2 of issues, including liability, including the 101 issue that's  
3 leading to so much expense. But we have an interesting  
4 opportunity here to resolve what seems to be this gray area in  
5 the law at that chance -- at -- at that appeal.

6 THE COURT: All right.

7 MR. CALDWELL: Now, Your Honor, on Gasoline Products,  
8 I -- actually I think I was accused of deriding Gasoline  
9 Products or something like that. I don't actually believe I  
10 mentioned it. But Mr. Curry, if -- if the Court will indulge,  
11 Mr. Curry will address Gasoline Products and this notion that  
12 everything has to be a do-over if --

13 THE COURT: Well, I mean, Apple argued that  
14 previously, and my order granting the new trial did address  
15 that your damages model needed to be new and different. You've  
16 told me I understand this morning that it will be. So given  
17 that and given the admission by the Defendant that if, in fact,  
18 it is, that's not an issue any longer, why is that still a  
19 matter we need to argue about this morning?

20 MR. CALDWELL: Because I bet if you asked Mr. Perry  
21 did you just agree to me that it's not an issue any longer and  
22 we don't need to retry the liability, then he's going to say  
23 no. And I think it's if we're going forward towards a new  
24 trial, this is --

25 THE COURT: Well, let's put it this way. He clearly

1 said he wanted to see your report, and I understand that. But  
2 I trust counsel for both sides are not going to take an  
3 untenable position on what something clearly is or isn't. And  
4 that possibility, though I don't expect it notwithstanding, I  
5 understand what that case says, and I understand what the  
6 issues are. I'm not sure that the Court will benefit by  
7 additional extensive argument on that this morning.

8 This was a -- this was a matter I thought we would  
9 handle in about an hour this morning, and we're into our third  
10 hour since we started this morning, so I'd like to at least  
11 wrap up before the noon hour gets here.

12 MR. CALDWELL: Sure. Apologies for -- for that.

13 THE COURT: If I feel I need further argument on that,  
14 I'll ask for further briefing.

15 MR. CALDWELL: Yes, Your Honor. Thank you. And  
16 apologies for the length. We just --

17 THE COURT: No problem.

18 MR. CALDWELL: -- do appreciate the opportunity to --  
19 to raise it.

20 THE COURT: It's a significant case, and -- and I want  
21 both sides to have their -- their opportunity to present their  
22 positions.

23 MR. CALDWELL: May I ask Mr. Curry what I'm -- what it  
24 is I may be forgetting?

25 THE COURT: You may consult with co-counsel.

1 MR. CALDWELL: Thank you.

2 I believe, Your Honor, just super briefly, if -- if  
3 Your Honor is not going to reconsider and reverse the new trial  
4 order, which obviously is our first request for relief, or not  
5 do the bifurcation and send up to the Federal Circuit, we  
6 believe that we would need some sort of an order that we are  
7 not permitted to re-present that model and then we would make  
8 an offer of proof just to make sure that we've done everything  
9 we need to to preserve error. And that's the only observation  
10 I would make.

11 THE COURT: All right. All right. Let me say this,  
12 counsel, before we conclude today's hearing.

13 It's clear to the Court for several reasons, one of  
14 which is the temporary stay imposed by the Circuit, that the  
15 September 14th date is no longer tenable. You've taken  
16 differing positions, you've given me your reasons, and I  
17 certainly will consider those. I'm not prepared from the bench  
18 today to give you a new date, but I will consider those and  
19 give you as reasonable guidance on that as I can as promptly as  
20 I can.

21 I do want those demonstratives submitted. I do want  
22 that profit number submitted, as I've instructed. And I will  
23 certainly consider your arguments this morning with regard to  
24 the motion, and I'll -- that is under submission at this time,  
25 and I'll attempt to get you some precise guidance on that as

1 soon as possible.

2 With that, I think we have covered the territory that  
3 the Court felt was necessary this morning. Unless either side  
4 has something of a status-related nature that I've overlooked  
5 and you wish to raise, we'll bring this to a close.

6 Is there anything further from the Plaintiff that  
7 we've not already taken up?

8 MR. CALDWELL: One -- one question of a status-related  
9 nature would be despite the -- the stipulation and the evidence  
10 that's the water under the bridge, we've got a supplemental  
11 interrogatory answer saying non-infringing alternatives that  
12 presumably Apple now wants to use, and obviously we didn't  
13 depose people and whatnot, we feel like we need to either  
14 orally or in written -- in writing make a motion to strike that  
15 answer or to preclude its use.

16 THE COURT: Well, I --

17 MR. CALDWELL: Your Honor, can we --

18 THE COURT: -- I -- I suggest, counsel, that when you  
19 get a new date for a new trial on damages, in advance of that,  
20 I'll get many motions filed. And certainly you're going to  
21 have whatever date that is that's yet to be set, you're going  
22 to have an opportunity to present the related motions that you  
23 think are appropriate, just like I expect the Defendant --  
24 we -- we joked a little bit back and forth about taking a bet  
25 on whether there's another Daubert or not, but I suspect I'm

1 going to get that, as well. So both sides are going to have an  
2 opportunity to engage in appropriate motion practice, and  
3 that's part of what the Court has to consider in setting a new  
4 date.

5 MR. CALDWELL: Thank you, Your Honor.

6 THE COURT: But that's not today.

7 MR. CALDWELL: No, very well. I just wanted to make  
8 sure that we weren't untimely by waiting until we get a  
9 schedule and kind of acting with the schedule. So I think  
10 we're very much on the same page as far as -- as far as that  
11 goes. That answers my question.

12 THE COURT: Well, you know, I'm not -- I'm not going  
13 to address what is or isn't timely until something gets filed  
14 and somebody objects to it as untimely. But I anticipate that  
15 there will be some, although I hope limited motion practice,  
16 necessary before a new trial on damages takes place.

17 MR. CALDWELL: Yes, Your Honor. I just -- I didn't  
18 want to file a motion if maybe there might be a more  
19 appropriate time and -- or vice versa and get in trouble for  
20 not having done it sooner.

21 THE COURT: Well --

22 MR. CALDWELL: I believe I understand Your Honor's --  
23 Your Honor's instructions.

24 THE COURT: You need to do what you think you need to  
25 do. If I don't think it's appropriate, you'll hear from me



1 that I don't think it's appropriate.

2 MR. CALDWELL: Yes, Your Honor. And --

3 THE COURT: Okay.

4 MR. CALDWELL: -- if the motion to reconsider is not  
5 granted or we're not going up on appeal, does Your Honor  
6 anticipate that along with the new trial setting, that Your  
7 Honor will tell us a day for exchange of expert reports, or are  
8 you envisioning if we're in that world, that you basically give  
9 us sort of a target end date and a hearing date, and we need to  
10 back populate?

11 THE COURT: I haven't decided that yet. Obviously,  
12 those kind of parameters are going to have to be set. Whether  
13 I give you a trial date and ask you to meet and confer and  
14 submit proposed other dates for an applicable but limited  
15 docket control order or whether I do that for you and then hear  
16 if you have objections, I haven't made that choice yet.

17 MR. CALDWELL: Yes, Your Honor.

18 THE COURT: Obviously, one way or the other, it's got  
19 to get done.

20 MR. CALDWELL: Yes, sir. Thank you, Your Honor.

21 THE COURT: Okay. Anything of a related nature to  
22 status of the case from the Defendant that we haven't raised  
23 previously this morning?

24 MR. PERRY: Nothing from Apple, Your Honor.

25 THE COURT: All right. As I say, these matters are

1 under submission. Thank you for your argument, counsel. You  
2 are excused.

3 COURT SECURITY OFFICER: All rise.

4 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes  
SHELLY HOLMES, CSR-TCRR  
OFFICIAL REPORTER  
State of Texas No.: 7804  
Expiration Date: 12/31/16

9/6/15  
Date